135

(1)

Supreme Court, U.S.
FILED
AUG 3 - 2009
OFFICE OF THE CLERK

No. 09-151

In The
Supreme Court of the United States

WILLIE PHILLIPS, MARY PHILLIPS,
LISA PRATER, CARLISA MILES,
YULANDER EDWARDS, AND LERDON WOODFOLK,
Petitioners,

v.

ROBERT GATES, SECRETARY
OF THE DEPARTMENT OF DEFENSE,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

SAMUEL N. LILLARD
McNEES WALLACE & NURICK LLC
21 E. STATE ST., 17TH FLOOR
COLUMBUS, OH 43215
(614) 469-8000

Counsel for Petitioners

August 3, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Whether the Court of Appeals must follow the precedent set by this Honorable Court regarding the burden of proof required for a disparate impact claim.

2. Whether the Court of Appeals' decision allowing a disparate treatment analysis to counter a disparate impact analysis negates the mandate of Congress in enacting 42 U.S.C. § 2000e-2(k) and creates further confusion as to the proper disparate impact standard.

3. Whether the Court of Appeals in disregarding 29 C.F.R. § 1607.4(D) has created an impossible burden for the disparate impact plaintiff when it was determined that the employer failed to maintain applicant flow data.

PARTIES TO PROCEEDING

Petitioners are Willie Phillips, Mary Phillips, Lisa Prater, Carlisa Miles, Yulander Edwards and Lerdon Woodfolk.

Respondent is Robert Gates, Secretary of the Department of Defense, who has oversight of the United States Defense Finance Accounting Office, an agency within the United States Department of Defense.

In addition to these parties, the following individuals were parties to the proceedings below: Todd Brooks, Emma Fields, Kevin Gray, Jackie McGrady, Susan McNeal, Marcia Spence, Jean Washington, and Denise Goudy.

RULE 29.6 STATEMENT

Each of the Petitioners is an individual and not a corporation or a subsidiary or affiliate of a corporation.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO PROCEEDING ii

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 5

REASONS WHY THE WRIT SHOULD BE GRANTED 17

I. Allowing The Employer To Counter Statistical Evidence Of Disparate Impact By Submitting An Expert Report On Lack Of Statistical Evidence Of Disparate Treatment Conflicts With The Court's Controlling Precedent And Creates Confusion Among The Circuits Regarding The Burden Of Proof Required For A Disparate Impact Claim. . 18

II. The Failure To Apply 29 C.F.R. §1607.4(D) When It Was Determined That The

Employer Failed To Maintain Promotion Data, Destroys The Balance Mandated By The Supreme Court In Wards Cove Between The Plaintiff's Burden In A Disparate Impact Claim And The Employer's Obligation To Maintain Applicant Flow Data. 23

CONCLUSION 25

APPENDIX

Appendix A: Sixth Circuit Opinion (May 5, 2009) 1a

Appendix B: District Court Opinion and Order (Jan. 5, 2007) 15a

TABLE OF AUTHORITIES

Cases

Alexander v. Local 496, Laborers' International Union of North America, 177 F.3d 394 (6th Cir. 1999), cert. denied, 528 U.S. 1154, 120 S.Ct. 1158, 145 L.Ed.2d 1070 (2000) 21, 22

Graoch Assoc. #33 v. Louisville/Jefferson County, 508 F.3d 366, 386 (6th Cir. 2007) 21

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 23

Kovacevich v. Kent State Univ., 224 F.3d 806 (6th Cir. 2000) 21, 22

Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998) 24

Phillips v. Cohen, 3 F. App'x 212 (6th Cir. 2001) 1

Phillips v. Cohen, 400 F.3d 388 (6th Cir. 2005) 1, 20, 21

Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68 (S.D.N.Y. 1991) 24

Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) 19, 20, 22, 24, 25

Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) 19, 20, 23

Welsh v. United States,
884 F.2d 1239 (6th Cir. 1998) 24

Statutes

28 U.S.C. § 1254(1) 1

42 U.S.C. § 2000e-2(k) ..... i, 3, 17

42 U.S.C. § 2000e-2(k)(1)(A)(i) 23

42 U.S.C. § 2000e-2(k)(1)(B)(i) 20

Regulations

5 C.F.R. § 310 11
29 C.F.R. § 1607.1 *et seq.* 24
29 C.F.R. § 1607.1 24
29 C.F.R. § 1607.4(A) 25
29 C.F.R. § 1607.4(C) 25
29 C.F.R. § 1607.4(D) 2, 17, 22
29 C.F.R. § 1607.14 24

Rules

Sup. Ct. R. 13 1

PETITION FOR WRIT OF CERTIORARI

Petitioners, Willie Phillips, Mary Phillips, Lisa Prater, Carlisa Miles, Yulander Edwards and Lerdon Woodfolk, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit decided and filed on May 5, 2009, in Case No. 07-3515, and reported as Phillips, et al., v. Gates, No. 07-3515 (6th Cir. May 5, 2009), and is reproduced at 1a.

This matter has made two prior appearances before the United States Court of Appeals for the Sixth Circuit, both reversing summary judgment, once on a limitations issue, and once on the merits. Those decisions are reported as Phillips v. Cohen, 3 F. App'x 212 (6th Cir. 2001); and Phillips v. Cohen, 400 F.3d 388 (6th Cir. 2005). This matter was tried to the district court which entered judgment for the defendant. The district court's decision is reported as Phillips, et al., v. Gates, No. 2:98-cv-799 (U.S. Dist. Ct. SE Div. Jan. 5, 2007), which is reproduced at 15a.

JURISDICTION

The Opinion of the United States Court of Appeals for the Sixth Circuit was entered May 5, 2009 (1a). This petition is timely filed. Sup. Ct. R. 13. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Uniform Guidelines On Employee Selection Procedures (1978) 29 C.F.R. § 1607.4(D)

D. Adverse impact and the "four-fifths rule." A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact. Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group. Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group. Where the user's evidence concerning the impact of a selection procedure indicates adverse impact but is based upon numbers which are too small to be reliable, evidence concerning the impact of the procedure over a longer period of time and/or evidence concerning the impact which the selection procedure had when used in the same manner in similar circumstances elsewhere may

be considered in determining adverse impact. Where the user has not maintained data on adverse impact as required by the documentation section of applicable guidelines, the Federal enforcement agencies may draw an inference of adverse impact of the selection process from the failure of the user to maintain such data, if the user has an underutilization of a group in the job category, as compared to the group's representation in the relevant labor market or, in the case of jobs filled from within, the applicable work force.

Unlawful employment practices
42 U.S.C. § 2000e-2(k)

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if -

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the

> Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C. 801 et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

The United States Defense Finance Accounting Office ("DFAS") was created in 1991 as an independent agency within the United States Department of Defense. The purpose of DFAS was to provide four services:

1. To pay contractors of the Department of Defense;

2. To pay vendors of the Department of Defense;

3. To pay accounting services for the smaller Department of Defense agencies; and

4. To disperse money for the smaller Department of Defense agencies.

Prior to DFAS' creation, 25,000 employees were working at field sites, which had their own systems, computer software and record keeping methods. In the beginning of 1990, DFAS decided to consolidate these field sites into one large agency to reduce costs and to

create efficiency and consistency of operation. When DFAS was created in 1991, the agency was unique from the other centers in that it did not have a workforce already established and ready to perform the consolidated activities that were going to be brought to Columbus, Ohio. Instead, DFAS-CO had a field office, called the Defense Contract Supply Center ("DCSC"), with a core group of 200 employees who were doing some of the consolidated work. These core groups were responsible for implementing the consolidation and staffing of the DFAS-CO workforce from 400-500 employees in 1991 to 3,500 employees in 1995. The consolidation process took 3-4 years and the initial effort was to bring not just the positions to Columbus, but the employees who held those positions at the time to utilize their skills. Despite this effort, less than 10% of the employees came with their positions in 1991. Those employees who transferred with their positions came from Atlanta, Boston, Albuquerque, New York, Los Angeles and elsewhere. Those employees who did arrive in Columbus with their positions were racially diverse. A large segment of the 10% of employees who re-located to Columbus were African-Americans.

During the rapid hiring period between 1991 and 1995, DFAS Columbus hired approximately 3,000 new employees and offered many promotional opportunities. Between 1991 and 1995, DFAS Columbus hired an average of 70 employees per month. Almost immediately after the rapid hiring period, a downsizing period occurred, caused by streamlining and operating efficiency.

During the 1991 to 1995 hiring period, DFAS was "very aggressively recruiting" for the new and empty

positions by filling them with non-federal employees "off the streets" of Columbus. During that period, the Petitioners began to notice that many of the other employees hired "off the streets" were Caucasian and had no prior government experience, yet were being rapidly and progressively promoted at a faster rate than themselves. Indeed, many of the Appellants found that, over time, their new white co-workers trained by them became their supervisors.

At the same time, the Petitioners witnessed what they believed to be favoritism and nepotism in the hiring and promotion process. For example, many of the Petitioners observed abuses in the detail process. Detailing is a policy where a manager directly fills a position with the desired employee instead of posting an open and vacant position for competitive bidding. This type of promotional procedure did not require that DFAS follow normal promotion procedures, thus, an employee could be promoted without competing with other applicants.

The Petitioners also noticed other practices that affected their promotional opportunities. These observations and resulting concerns created an open morale problem for DFAS management in 1995.

The Petitioners' primary concern was that a number of employment practices existed at DFAS which impacted them negatively, including detailing, general favoritism, nepotism, pre-selection, favoritism in issuing performance ratings and performance awards, and harsher treatment of African-American employees through discipline.

Further, the competitive promotion process at DFAS-CO was complex, and consisted of over eighteen separate steps which provided the selecting official a large amount of discretion when promoting employees. This promotional process permitted the supervisor to determine such steps as (1) the timing of an opening, how the position was filled, (2) who could apply for the position based on the area of consideration, (3) the criteria for the selection, (4) who was on the promotion certificate with the discretion to request more names on the certificate, and (5) the ultimate decision to select the desired candidate from the certificate. By design, this process gave the supervisor unbridled discretion and input into the promotion process. As a result, the promotion process became highly vulnerable to favoritism and pre-selection among selecting managers to favor a particular candidate.

In 1996, several DFAS newspaper articles were written by, and to, DFAS-CO employees which discussed why few African-American employees were being promoted to higher GS levels. As a result, the Director of DFAS-CO, Charles Coffee, and his Principal Deputy Director, Ida Faye Groves, directed a team of DFAS employees and two outside consultants to investigate allegations of favoritism, racism and pre-selection.

On December 6, 1996, Director Coffee, issued a Memorandum stating that as a result of "numerous concerns from our employees regarding Merit Promotion and Equal Employment Opportunity issues," he was establishing a Process Action Team (PAT) to review and evaluate the Appellee's "Merit Promotion policy and procedures" and to examine the following issues:

1. **Are only non-minorities advancing to GS-11 level and above?**
2. **Is there pre-selection of jobs?**
3. **Are management selection patterns discriminatory? and**
4. **Are personal relationships impacting selection and promotions?**

The PAT team consisted of DFAS-CO employees and two outside consultants named Thomas Gary and Roland McDonald from Togar & Associates. The PAT team took a two-pronged approach which included interviewing 25% of the DFAS-CO workforce to obtain current perceptions, and then analyzing the actual merit promotion and EEO statistical data for the years 1995 and 1996.

After several months of investigation and study, the PAT team released its report on March 3, 1997, (dated January 24, 1997), with the title "Employee Survey and Assessment of Defense Finance & Accounting Service Columbus Center". The PAT Report was 122 pages in length and analyzed twelve issues:

1. Limited upward mobility opportunities for employees.
2. Limited internal mobility.
3. Consistency in rating, ranking and referral of applicants.
4. Are only non-minorities advancing to the GS-11 level and above?
5. Is there disparity in assessing candidates' qualifications?
6. Is there pre-selection for jobs?

7. Are personal relationships impacting selections and promotions?
8. Does nepotism exist – family members (spouses/children) in the same organizations or in supervisory chains?
9. Are management selection patterns discriminatory?
10. In the distribution of awards, performance appraisals, and disciplinary actions equitable?
11. Do employees fear reprisal from DFAS-CO and Columbus Center EEO personnel?
12. Does the EEO staff only comply with management's decisions?

After the release of the PAT Report, the Petitioners became aware for the first time of the statistical barriers in merit promotional opportunities for African-American employees at DFAS-CO as indicated by the following conclusions of the PAT team:

1. Minorities continue to be promoted at lower rates than non-minority employees especially at the higher levels;

2. Several groups, especially Black males, continue to be underrepresented at the higher grade levels at the Columbus Center;

3. Evaluation of application content was subjective;

4. There is a strong perception that discrimination, whether race based or not, exists at the Columbus Center. In the case of

employee X [Chris Carter], management may have committed a prohibited personnel practice;

5. White females received 72 percent of the exceptional rating in 1995. This may have impacted their selection during the Merit Promotion process... [T]his research has shown that supervisors rate employees from their own RNO [Race National Origin] group higher than they rate employees from other groups; and

6. The data shows that White male ... selecting officials show strong ethnic preferences in awarding promotions.

Further, the PAT Team concluded in the Togar section of the PAT Report that:

1. The allegation of [favoritism and preselection] appears to have validity in the case of employee X;

2. Regarding Nepotism at DFAS-CO, the team stated "With the exception of the two individuals, all name provided met the definition of a relative as defined in 5 CFR 310";

3. Regarding perceived favoritism, the Team concluded: "The core of individuals perceived to be benefactors of favoritism have all been promoted at least once within the last five years. Three of those individuals have been promoted twice, 2 to the GS-14 level and 1 to the GS-15 level. Some employees have held

> assignments and participated in various special projects."

Id.

After the PAT Report was provided to Director Coffee and Deputy Director Groves, Principal Deputy Director Groves made a power point presentation of its results to DFAS Headquarters in Arlington, Virginia on February 24, 1997. In her presentation, she discussed the background of the PAT Report and the concerns of the employees. She told senior level officials that according to the PAT report: "Minorities continue[d] to be promoted at lower rates than non-minorities especially at the higher grade levels." Ms. Groves further admitted that White males selected African-American employees only 10.49% of the time when they made up 21% of the DFAS population.

Following Ms. Groves' presentation at DFAS Headquarters, the PAT Report was released to DFAS employees. On July 30, 1997, Petitioner, Willie Phillips, on behalf of a group of DFAS-CO African-American employees, filed a discrimination complaint with the agency's equal employment opportunity office. The complaint alleged that the following practices had caused a disproportional low number of African-American employees to receive promotions:

1. the temporary assignment ("detailing") of White employees into higher-grade positions, which placed them at an advantage in consideration for permanent positions;

2. ethnic preferences for White candidates, among White officials making promotion selections;

3. discretion vested in selecting officials to consider "specialized experience" in promotion decisions;

4. manipulation of performance reviews, employee awards, and the timing of job announcements to give preference to White candidates in the promotion process; and

5. granting promotions to White employees who did not meet the time and grade requirements for the position.

Following its own investigation, the EEO office issued its report July 24, 1997. The EEO Officer made the following findings noted in the Sixth Circuit decision:

1. African-American employees received about 22% of the competitive and non-competitive promotions agency-wide in 1995-96 which comprised approximately the same percentage of the DFAS-CO workforce at that time;

2. For the fiscal year 1995, African-Americans, totaling 670 at DFAS-CO, received a total of 159 awards which comprised of 24% of African-Americans receiving awards;

3. White employees numbering 2,253, received 787 awards, which was 34.9% of Whites receiving awards;

4. African-American employees received 31 disciplines in 1996, or 48.9% of the total disciplinary actions;

5. White employees received 30 disciplinary actions, or 46.87%;

6. The number of African-American employee disciplinary violations comprised 4.5% of the African-American workforce at DFAS-CO;

7. The number of White employee violations comprised 1.33% of the White workforce at DFAS-CO; and

8. African-American employees received 15.75% of the exceptional performance ratings in 1996 while comprising almost 22% of employees. There was no comparative data for White employees.

At trial, Petitioners presented the testimony of Dr. Ramona L. Paetzold, Ph.D., who is an expert in employment discrimination statistics. Dr. Paetzold reviewed data from 1992 to 1996 describing the promotional practices at DFAS-CO for African-American employees compared to the promotion rates for White employees to determine whether the promotion rate for African-American employees was significantly smaller. Her analysis consisted of (1) looking at the aggregate of promotion rates, (2) reviewing the number of promotions for African-American employees as a percentage to get their promotion rate, (3) considering the number of promotions for White employees using their percentage of who got promoted, and (4) comparing both promotion rates by using a binomial test for African-Americans and White employees for the period of 1992 to 1996.

Dr. Paetzold's testimony offered the supported conclusion that African-American employees were promoted at a statistically significant lower rate compared to Whites within a reasonable degree of scientific certainty. She based her conclusions on her findings that the difference in the two promotional rates for African-Americans and Whites were greater than two standard deviations, so that the amount of spread between the two rates was quite large. Since the promotion spread for each group was more than two standard deviations, Dr. Paetzold found that the statistical evidence suggested discrimination. Admittedly Dr. Paetzold encountered a difficulty in her statistical analyzes due to the fact that DFAS-CO's failed to maintain all the applicant flow data. The data of who applied for the available positions and were not promoted. However, Dr. Paetzold was able to compensate for the lost data through her methodology. Dr. Paetzold used a single pool approach by aggregating all the data and conducting 'one large analysis' of racial discrepancies in promotions at DFAS-CO The approach exaggerated the number of applicants for any promotion available but did so equally for both African-Americans and Caucasians.

DFAS's expert, Dr. John G. Claudy, took a different approach. In order to compensate for the lost applicant-flow data of employees who applied for promotions, Dr. Claudy created "constructed pools of applicants," and analyzed promotions in pairs of years, based on assumptions of who would be eligible in the work force. In addition to Dr. Claudy's approach having been criticized by the Sixth Circuit in a previous review of this case, Dr. Claudy's approach was essentially a disparate treatment review of whether there was statistical evidence that the

decision maker for each constructed pool was making intentionally discriminatory hiring decisions. This approach was flawed and should not have been compared to Dr. Paetzold's anaylsis.

In sum, the trial court was presented with sufficient evidence to meet the Petitioner' burden under the theory that Petitioner's promotional practices have had a disparate impact on their opportunities to seek promotions and advance their careers because of their race.

Upon review, the Court of Appeals held that the district court did not err in finding that the expert evidence was in equipoise and that the plaintiffs failed in their burden to establish a prima facie case of disparate impact:

> Although Appellants argue that '[t]he trial court erred in finding Dr. Claudy's expert opinion as credible and trustworthy as Dr. Paetzold's,' it might be better said that the magistrate judge found both expert opinions equally problematic. He therefore accepted neither expert's analysis, and concluded that Appellants had not carried their burden. Although the PAT report, the EEO report, and Appellants' testimony provided some evidence of a perceived race-based disparity at DFAS-CO, the evidence was not sufficient to require a finding that Appellants had demonstrated the type of statistical disparity necessary to establish a Title VII prima face case.

The Court of Appeals also held that the court below did not abuse its discretion in imposing only monetary

sanctions for the destruction of data; as Petitioners had sought an adverse inference. The Sixth Circuit held that such sanctions were not required pursuant to 29 C.F.R. § 1607.4(D), and that "both statistical experts at trial testified that the data from the PAT investigation would not have substantially altered their analyses because it would only have included a sample of information from a two-year period and would not have helped to establish promotion rates for the total period in question."

REASONS WHY THE WRIT SHOULD BE GRANTED

This petition for a writ of certiorari should be granted for two principal reasons. First, the decision of the Sixth Circuit Court of Appeals conflicts with controlling Supreme Court precedent regarding the burden of proof required for a disparate impact claim creating further confusion among the Circuits. Second, the Court of Appeals' decision allowing a disparate treatment analysis to counter a disparate impact analysis, as well as not following 29 C.F.R. § 1607.4(D) when it was determined that the employer failed to maintain applicant flow data, has created an impossible burden for the disparate impact plaintiff and negates the mandate of Congress in enacting 42 U.S.C. § 2000e-2(k).

I. Allowing The Employer To Counter Statistical Evidence Of Disparate Impact By Submitting An Expert Report On Lack Of Statistical Evidence Of Disparate Treatment Conflicts With The Court's Controlling Precedent And Creates Confusion Among The Circuits

Regarding The Burden Of Proof Required For A Disparate Impact Claim.

The Court of Appeals erred as a matter of law in finding that the employer's expert's opinion and the Petitioners' expert's opinion stood in equipoise and therefore the Petitioner failed to show a disparate impact by a preponderance of the evidence. This was in error as the Petitioners' expert used a correct single pool disparate impact analysis, where the employer's expert used a "constructive pool" approach that statistically tested for whether there existed disparate treatment by selecting officials in hiring within pools of applicants. This created a classic apples to oranges comparison error and will create confusion among the Circuits if not corrected.

The Petitioners' expert, Dr. Ramona Paetzold, a nationally known author in employment discrimination statistics, addressed whether African-American employees at DFAS-CO were promoted at a lower rate compared to white employees. Admittedly, Dr. Paetzold and the employer's expert, Dr. John G. Claudy, encountered a problem in their statistical analyses due to the employer's failure to retain the applicant flow data regarding those employees who had applied for promotions. Petitioners' expert, Dr. Paetzold, was able to compensate for the lost data through her methodology. Petitioners' expert used a single pool approach by aggregating all the data and conducting 'one large analysis' of racial discrepancies in promotions at DFAS during the relevant time frame. A standard disparate impact approach. Using this approach, Dr. Paetzold found that the difference in promotion rates between African-Americans and

White employees exceeded two standard deviations, beyond what would be expected in the absence of discrimination.

Unlike Dr. Paetzold, the employer's expert, Dr. Claudy, instead used an approach that is used to find statistical evidence for disparate treatment. In order to compensate for the lost data regarding which employees applied for promotions, Dr. Claudy created "constructed pools of applicants," based on his assumptions of likely applicants. Dr. Claudy based his statistical report using these "constructed pools" which were manufactured to compensate for the missing data. Dr. Claudy then analyzed the races of those promoted from each pool to determine if there existed statistical evidence that the hiring official engaged in discriminatory selection based on race. The data was then compiled in the aggregate. This was a statistical review of whether there existed intentional discriminatory hiring, not a disparate impact analysis. As this Court held, a disparate impact case under Title VII may be established upon demonstration that a particular employment practice causes a significant adverse effect on a protected group. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657 (1989). Likewise, this Court directed that under a disparate impact claim, an employer is prohibited from relying on a neutral employment practice which is nondiscriminatory on its face, but results in a disproportionate impact on a protected class without regard to intent. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986-87 (1988). Further, this Court established that disparate impact theory of proof applies to claims of discrimination based on an employer's subjective and discretionary decision-making regarding promotions, even though the use of

subjective criteria in decision-making is not discriminatory *per se*. Watson, 487 U.S. at 989.

Also established by this Court in Watson, in a disparate impact case the complaining party must first identify the specific employment practice that is allegedly responsible for any observed statistical disparity. Id. at 994. "'Once the employment practice at issue has been identified, causation must be proved; that is, the [plaintiff] must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused' the alleged discrimination." Wards Cove, 490 U.S. at 656, *quoting*, Watson, at 994.

Congress also mandated the requirement that a plaintiff must demonstrate that each particular challenged employment practice causes a disparate impact, "except that [if] the complaining party can demonstrate to the court that the elements of a respondent's decision making process are not capable of separation for analysis, the decision making process may be analyzed as one employment practice." 42 U.S.C. § 2000e-2(k)(1)(B)(i). In this case, the promotional process was previously held as incapable of separation. Phillips v. Cohen, 400 F.3d 388, 398-99 (6th Cir. 2005). Although a disparate impact case generally requires proof of "identification, impact and causation," the Sixth Circuit, in a previous review of this case, departed from this requirement. Phillips v. Cohen, 400 F.3d at 398, n. 8,

According to the prior holding, "[i]f the employee challenges the employer's promotion process as a whole, * * *- as in the case here - then the disparate impact and causation elements merge." Id. Thus, the Sixth Circuit held in this matter that the issue that

must be addressed is ,"* * * whether the evidence in the record support[s] a finding that African-American employees [are] promoted at a lower rate than white employees." Id.

Again, the error is the Sixth Circuit's allowance of the employer's disparate treatment analysis to be used to offset the Petitioners' expert's disparate impact analysis. This petition for a writ of certiorari should be granted because the allowance of this error will further confuse the burden of proof for disparate impact claims in the Sixth Circuit and elsewhere. As noted by the Concurrence in Graoch Assoc. #33 v. Louisville/Jefferson County, 508 F.3d 366, 386 (6th Cir. 2007), the Sixth Circuit's cases on disparate-impact claims under Title VII currently conflict. In Graoch, the Concurrence noted that:

> The Sixth Circuit's cases on disparate-impact claims under Title VII, however, conflict. Kovacevich [v. Kent State Univ., 224 F.3d 806 (6th Cir.2000)], holds that once a plaintiff has shown an adverse effect, the burden shifts to the defendants to "articulate a legitimate business reason" for the challenged practice. 224 F.3d at 830. Once the defendant has proffered such a reason, under Kovacevich "the burden shifts back to the plaintiff to show either that the [defendant's] reason is a pretext for discrimination, or that there exists an alternative . . . practice that would achieve the same business ends with a less discriminatory impact." *Id.* In contrast, *Alexander [v. Local 496, Laborers' International Union of North America,* 177 F.3d 394 (6th Cir. 1999), *cert. denied,* 528 U.S. 1154, 120 S.Ct. 1158, 145

> L.Ed.2d 1070 (2000)] holds that once a plaintiff has established a prima facie case by showing adverse effect, "the burden shifts to the [defendant] to produce evidence that the challenged practice is a business necessity." 177 F.3d at 405-06. The difference between the two opinions lies in the fact that by requiring the plaintiff to prove pretext, Kovacevich both imports an intent-oriented principle from the disparate-treatment test into the disparate-impact analysis and places the ultimate burden of persuasion on the plaintiff rather than on the defendant.

This conflict within the Sixth Circuit over the burden required to prove a disparate impact claim is caused by the inappropriate inclusion of "intent-oriented" principles from disparate treatment tests. This conflict has yet to be resolved. The Court of Appeals further erred in this matter by allowing compelling statistical evidence of disparate impact to be refuted by an expert's report that discussed a lack of statistical evidence of disparate treatment. This error exacerbated this present conflict and moves the Circuit further outside the controlling Supreme Court's precedent.

II. The Failure To Apply 29 C.F.R. § 1607.4(D) When It Was Determined That The Employer Failed To Maintain Promotion Data, Destroys The Balance Mandated By The Supreme Court In Wards Cove Between The Plaintiff's Burden In A Disparate Impact Claim And The

Employer's Obligation To Maintain Applicant Flow Data.

The Supreme Court's seminal disparate impact case, Griggs v. Duke Power Co., explained that Congress' objective in enacting Title VII was to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." 401 U.S. 424, 429-30 (1971). Congress has allowed for the identification of these barriers to hiring and promotion by an analysis of the statistical evidence of the selection process. 42 U.S.C. § 2000e-2(k). The Supreme Court has guided this analysis by holding that "statistics based on an applicant pool containing individuals lacking minimal qualifications for the job would be of little probative value." Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988), 487 U.S. at 977, 108 S.Ct. 2777. Further, a statistical analysis cannot establish a plaintiff's prima facie case unless it is based on promotion data restricted to qualified employees, or (1) reliable data with respect to that group are unavailable and (2) the plaintiff establishes that the statistical analysis uses a reliable proxy for qualification. This approach holds plaintiffs to their statutory burden to "demonstrate that an employer uses a particular employment practice that causes a disparate impact on the basis of . . . race," 42 U.S.C. § 2000e-2(k)(1)(A)(i), without imposing an insurmountable burden when reliable data on a qualification are not available.

In this matter, the Court of Appeals erred in disregarding the most troubling aspect of the employer's conduct in this case; the failure to preserve the application flow data for those employees who

applied for promotion but were not selected. The employer was obligated to preserve this evidence from three sources in the law:

1) The well-established obligation to preserve evidence relevant to future litigation;
2) 29 C.F.R. §§ 1607.1 & 1607.14; and
3) The district court's preservation order.

The Federal Court's have maintained a long-standing principle of law that a party is obligated to preserve evidence that is relevant to litigation. See Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998); Turner v. Hudson Transit Lines, Inc. 142 F.R.D. 68, 72-73 (S.D.N.Y. 1991); Welsh v. United States, 884 F.2d 1239, 1246 (6th Cir. 1998). This obligation has been held to arise when a party has notice that the evidence is relevant to litigation, but also when a party should have known that the evidence may be relevant to future litigation. Kronisch, 150 F.3d at 126. Further, employers are under the specific obligations imposed by 29 C.F.R. §§ 1607.1 & 1607.14 to preserve these promotional records. In Wards Cove, the Supreme Court noted how the plaintiff's burden in a disparate impact claim is by necessity tied to the employers obligation to maintain such application flow data:

> Some will complain that this specific causation requirement is unduly burdensome on Title VII plaintiffs. But liberal civil discovery rules give plaintiffs broad access to employers' records in an effort to document their claims. Also, employers falling within the scope of the Uniform Guidelines on Employee Selection Procedures, 29 CFR § 1607.1 *et seq.* (1988), are

> required to "maintain . . . records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group[s]." See § 1607.4(A). This includes records concerning "the individual components of the selection process" where there is a significant disparity in the selection rates of whites and nonwhites. See § 1607.4(C). Plaintiffs as a general matter will have the benefit of these tools to meet their burden of showing a causal link between challenged employment practices and racial imbalances in the work force; respondents presumably took full advantage of these opportunities to build their case before the trial in the District Court was held.

Wards Cove Packing Co., Inc., et al. v. Atonio et al. 490 U.S. 642, 657-58 (1989).

This petition for a writ of certiorari should be granted to clarify the proper disparate impact burden where records have not been retained as required. By failing to correctly set that standard as the law contemplates, the Court of Appeals made it all but impossible for any plaintiff to meet its burden in any disparate impact case where an employer fails in its obligation to maintain records, rendering the cause of action a legally futile effort.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SAMUEL N. LILLARD
McNees Wallace & Nurick LLC
21 E. State St., 17th Floor
Columbus, OH 43215
(614) 469-8000

Counsel for Petitioners

Dated: August 3, 2009

APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 09a0319n.06

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 07-3515

[Filed May 5, 2009]

WILLIE S. PHILLIPS, et. al.,	)
	)
Plaintiffs-Appellants,	)
	)
v.	)
	)
ROBERT GATES, SECRETARY OF THE DEPARTMENT OF DEFENSE,	)
	)
Defendant-Appellee.	)
	)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

BEFORE: MARTIN, BATCHELDER, and DAUGHTREY, Circuit Judges.

ALICE M. BATCHELDER, Circuit Judge. Appellants are African-American current and former employees of the Defense Finance and Accounting Service in Columbus, Ohio ("DFAS-CO"), an independent agency within the federal Department of Defense ("DOD"). They claim that DFAS-CO's promotion policies disparately impacted them on account of their race. Following a bench trial, the magistrate judge ruled in favor of the Secretary of Defense ("Secretary"). For the reasons that follow, we affirm.

DFAS-CO's main function is to pay the DOD's vendors and contractors; it also issues disbursements and provides accounting services for smaller agencies within the DOD. DFAS-CO was created in 1991 to consolidate the work of several regional offices. The DOD sought to recruit employees from these offices to come to the new center in Columbus, but fewer than 10% of the employees agreed to transfer. A significant percentage of the employees who did transfer were African-American.

From 1991 to 1995 the DFAS-CO workforce expanded from 400-500 employees to 3,500 employees. This increase featured rapid hiring (an average of 70 new hires per month) and numerous opportunities for promotions. Because only a small number of employees transferred from other offices, most of the hires were "off the street" — of people from the Columbus area. Some African-American DFAS-CO employees perceived that many of the newly-hired white employees were being promoted at a faster rate than they were, despite the African-American employees' seniority. These African-American employees also perceived that they had been subject to more

disciplinary actions and had received fewer awards than white employees, that promotions were made on the basis of personal friendships and connections, and that supervisors engaged in preselection — all of which, they felt, limited African-American employees' opportunities for promotions.

In response to employees' complaints about the promotions process, the directors of DFAS-CO organized a Process Action Team ("PAT") to investigate the allegations. This team, which included DFAS-CO employees and two outside consultants, was to address specific issues: (1) whether only non-minorities were advancing to the GS-11 pay grade and above; (2) whether preselection of jobs existed; (3) whether management selection patterns were discriminatory; and (4) whether personal relationships were impacting selections and promotions. In its investigation, the team interviewed 25% of the DFAS-CO workforce and analyzed promotions and Equal Employment Opportunity ("EEO") statistical data for the years 1995 and 1996. The interviewed employees included both randomly selected workers and volunteers.

In March 1997, the team released a report ("the PAT report") finding that: (1) minorities were promoted at lower rates than non-minorities, especially at higher grade levels; (2) several groups, especially African-American men, were under-represented at higher grade levels; (3) evaluation of application content was subjective; (4) there existed a strong perception that discrimination, whether race-based or not, existed at DFAS-CO; (5) management may have committed a prohibited personnel practice in the case of a

particular white employee; (6) white women received 72% of the exceptional performance ratings in 1995; (7) supervisors rated employees within their own race or national origin more highly than employees from other groups; and (8) selecting officials who were white men showed strong, ethnic preferences in awarding promotions.

Following the release of the PAT report, Appellant Willie Phillips filed a discrimination complaint with DFAS-CO's EEO office. After an investigation, the EEO office issued its own report in which it found, among other things, that African-American employees received about 22% of all promotions in 1995-1996, which reflected the approximate percentage of African-American employees in the DFAS-CO workforce during that period. An administrative judge subsequently dismissed the complaint.

The Appellants then filed suit, alleging that the Secretary's practices and procedures regarding employee promotions had a disparate impact on African-American employees in violation of Title VII. The district court granted summary judgment in favor of the Secretary on the ground that Appellants had failed to file a timely administrative complaint. We reversed, finding that equitable tolling applied. *Phillips v. Cohen*, 3 F. App'x 212 (6th Cir. 2001) ("*Phillips I*").

On remand, the district court referred the case to a magistrate judge, who entered summary judgment for the Secretary — this time on the grounds that Appellants had not produced any evidence of a disparate impact or traced the alleged impact to any of the Secretary's policies. We again held in favor of

Appellants, finding that there remained for trial a material issue of fact regarding the existence of a disparate impact. *Phillips v. Cohen*, 400 F.3d 388 (6th Cir. 2005) ("*Phillips II*"). We also held that the magistrate judge had failed both to assess the quality of evidence that had been lost by Appellee, or, in violation of a court order, routinely destroyed pursuant to the agency's internal regulations, and to determine appropriate sanctions.

On further remand, the magistrate judge conducted a bench trial and found that Appellants had failed to prove a disparate impact by a preponderance of the evidence. The magistrate judge also evaluated the quality of the lost evidence and determined that the loss did not negatively impact Appellants' case; the judge did, however, award Appellants attorney's fees and costs incurred in connection with their motion for sanctions. This appeal followed.

II.

Appellants raise several arguments on appeal. First, they contend that the trial court erred in finding that they had failed to prove a disparate impact by a preponderance of the evidence. Second, they argue that the trial court did not sanction the Secretary harshly enough for failing to preserve evidence. Finally, they maintain that the court erroneously dismissed Plaintiff-Appellant Todd Brooks.

A.

"This Court's standard of review in a Title VII discrimination case is 'narrow.'" *Dunlap v. TVA*, 519 F.3d 626, 629 (6th Cir. 2008) (quoting *Isabel v. City of*

Memphis, 404 F.3d 404, 411 (6th Cir. 2005)). In a disparate impact case, a trial court's findings of fact should stand unless clearly erroneous. *Id.* "The issue is not whether the [trial] court reached the best conclusion, but whether the evidence before the court supported the [trial] court's findings." *Id.* (citation omitted). "Also, the [trial] court's findings based on the credibility of the witnesses before it are entitled to great deference on appeal." *Id.* (citation omitted).

To succeed with a disparate-impact claim, a plaintiff must first "establish a prima facie case of discrimination — i.e., the plaintiff must establish that an adverse impact has occurred." *Id.* "If he succeeds, the employer must show that the protocol in question has 'a manifest relationship to the employment' — the so-called 'business necessity' justification." *Id.* (quoting *Griggs v. Duke Power*, 401 U.S. 424, 431 (1971)). "The plaintiff must then show that other tests or selection protocols would serve the employer's interest without creating the undesirable discriminatory effect." *Id.* (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425, 432 (1975)).

To establish a prima facie case, the plaintiff must challenge a specific employment practice and prove, through relevant statistical analysis, that the challenged practice has an adverse impact on a protected group. *Id.* (citing *Johnson v. U.S. Dep't of Health and Human Servs.*, 30 F.3d 45, 48 (6th Cir. 1994)). The prima facie case is sometimes said to comprise three elements — identification, disparate impact, and causation. *See, e.g., EEOC v. Steamship Clerks Union, Local 1066*, 48 F.3d 594, 601 (1st Cir. 1995). If, however, "the employee challenges the employer's promotion process as a whole . . . then the

disparate impact and causation elements merge." *Phillips II*, 400 F.3d at 397-98 n.8. Accepting *arguendo* Appellants' argument that the DFAS-CO promotion practices are incapable of separation,[1] we consider the disparate-impact and causation elements to address the same question: "whether the evidence in the record supported a finding that African-American employees were promoted at a lower rate than white employees." *Id.*

"In cases involving promotion policies, the relevant inquiry is comparing the number of protected group members benefitting from promotions with the number seeking them; this figure is then contrasted with the corresponding ratio for the non-protected group." *Id.* at 399 (citing *Connecticut v. Teal*, 457 U.S. 440, 448 (1982)). "[S]tatistics based on an applicant pool containing individuals lacking minimal qualifications for the job would be of little probative value," however. *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 997 (1988) (citations omitted). And while "sufficiently substantial" statistical disparities raise an inference of disparate impact, the relevant analysis should not be "framed in terms of any rigid mathematical formula." *Id.* at 994-95.

Ideally, to determine if African-American employees were promoted at a lower rate than their

---

[1] In the second appeal in this litigation, we noted that Appellee did not challenge the magistrate judge's finding that DFAS-CO's promotion process "should be considered as a whole" or Appellant's argument that the process was "incapable of separation." *Phillips II*, 400 F.3d at 397-98. The Secretary does not argue before us that the promotion process should be analyzed on a piecemeal basis.

white counterparts, one would compare the respective ratios of promoted African-American and white employees to the number of qualified African-American and white applicants. The parties could not make this comparison here, however, because under the DFAS-CO document retention policy, applicant flow data was destroyed every two years, on a rolling basis. By the time Appellants filed their complaint in October 1998, only data for 1997 and part of 1996 existed.

In an attempt to reconstruct the relevant ratios, Appellants and the Secretary presented statistical experts who employed different methods. Appellants' expert, Dr. Ramona Paetzold, compared the racial composition of all promoted employees to the racial composition of the entire DFAS-CO workforce. This method assumed that every DFAS-CO employee applied for every job opening, irrespective of whether the employee would, in fact, be qualified, unqualified, or overqualified for the position. Dr. Paetzold thus based her statistical analysis on an applicant pool that necessarily included "individuals lacking minimal qualifications." *See Watson*, 487 U.S. at 997. Dr. Paetzold determined that African-American employees were promoted at a significantly lower rate than were white employees.

The Secretary's expert, Dr. John Claudy, created "constructed pools" of applicants for each promotion. Dr. Claudy examined employee grades in pairs of successive years to determine when promotions had occurred. For example, if an employee was listed as a grade GS-7 in 1995 but as a grade GS-8 in 1996, then Dr. Claudy assumed that a promotion had taken place. For each promotion, Dr. Claudy constructed a pool of

employees in the same (pre-promotion) grade level and job series as the successful applicant. This method had the advantage of using an applicant pool that was more likely to approximate the group of employees who were qualified for and actually applied for a given promotion. It was nonetheless flawed in that it failed to account for the fact that sometimes employees could qualify for and would apply for promotions outside of their job series. Dr. Claudy determined that: in some grade levels African-Americans were promoted at a rate higher than would be expected, in other grade levels African-Americans were promoted at a rate lower than would be expected; and in only one grade level (Grade 5) were African-Americans promoted at a rate lower than two standard deviations from what would be expected.

The magistrate judge noted the flaws with both approaches, found that the experts' conclusions stood in equipoise, and determined that Appellants had failed to show a disparate impact by a preponderance of the evidence. The magistrate judge further found that the PAT report did not prove a disparity in promotion rates between African-Americans and whites because the report compared the percentage of African-American employees receiving promotions at DFAS-CO to the percentage of African-American employees in the Columbus labor force. The PAT report did not account for minimal qualifications for the promotions, nor did it purport to analyze the alleged disparity in terms of standard deviations. As for the EEO report, the magistrate judge determined that its findings were skewed because its survey sample was not entirely random but included a disproportionate number of African-American respondents. Finally, the magistrate judge found that

Appellants' testimony did not establish a disparate impact because the individual witnesses testified only that they were denied promotions for which they applied and for which they believed themselves to be qualified. They did not establish that they were denied the promotions on account of their race, and their anecdotal evidence did not prove a significant difference in the promotion rates between whites and African-Americans at DFAS-CO.

The magistrate judge's findings are not clearly erroneous. Although Appellants argue that "[t]he trial court erred in finding Dr. Claudy's expert opinion as credible and trustworthy as Dr. Paetzold's," it might be better said that the magistrate judge found both expert opinions equally problematic. He therefore accepted neither expert's analysis, and concluded that Appellants had not carried their burden. Although the PAT report, the EEO report, and Appellants' testimony provided some evidence of a perceived race-based disparity at DFAS-CO, the evidence was not sufficient to require a finding that Appellants had demonstrated the type of statistical disparity necessary to establish a Title VII prima face case.

B.

"We review a district court's imposition of sanctions for abuse of discretion." *Fieger v. Cox*, 524 F.3d 770, 774 (6th Cir. 2008) (quoting *Frank v. D'Ambrosi*, 4 F.3d 1378, 1387 (6th Cir. 1993) (citing in turn *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 399 (1990))).

On December 18, 1998, the district court issued a retention order that required DFAS-CO to preserve existing records related to this litigation. By that time,

however, DFAS-CO already had destroyed almost all of the applicant flow data for the years 1996 and earlier because its document retention policy called for such materials to be destroyed on a two-year, rolling basis. Thomas Gary, head of Togar and Associates, the outside consultant that assisted DFAS-CO with the PAT report, testified that he took with him two boxes of materials used in the creation of the PAT report. These materials would have included only data for the years 1995-1996 and likely did not include all applicant flow data even from that period. Gary testified that in late 1997 or early 1998 he sent the boxes to DFAS-CO headquarters in Arlington, Virginia. The magistrate judge held that if DFAS-CO had taken steps to look for those materials immediately after the district court's order, DFAS-CO might have been able to locate the PAT documents. The magistrate judge granted Appellants attorney's fees and costs incurred in pursuing their motion for sanctions.

Appellants claim that this sanction was not enough and that the magistrate judge should have "lowered the bar" on differences in the promotion rate or allowed an inference of adverse impact pursuant to 29 C.F.R. § 1607.4(D). That regulation provides in part:

> Where the user has not maintained data on adverse impact as required by the documentation section of applicable guidelines, the Federal enforcement agencies may draw an inference of adverse impact of the selection process from the failure of the user to maintain such data, if the user has an underutilization of a group in the job category, as compared to the group's representation in the relevant labor

> market or, in the case of jobs filled from within, the applicable work force.

Nothing in this regulation requires federal judges to impose any particular sanction on an entity that has failed to preserve records that may bear on adverse employment impacts. It permits, but does not require, federal enforcement agencies to draw inferences. It does not abrogate the discretion trial judges have in imposing appropriate sanctions. Moreover, both statistical experts at trial testified that the data from the PAT investigation would not have substantially altered their analyses because it would only have included a sample of information from a two-year period and would not have helped to establish promotion rates for the total period in question. We find no abuse of discretion here.

C.

We review for abuse of discretion a trial court's decision to dismiss a party. *Sutherland v. Michigan Dep't of Treasury*, 344 F.3d 603, 612 (6th Cir. 2003); *see* FED. R. CIV. PRO. 21 ("On motion or on its own, the court may at any time, on just terms, add or drop a party."). We therefore "affirm the dismissal of a party for misjoinder unless this court is left with a definite and firm conviction that the trial court committed a clear error of judgment." *Sutherland*, 344 F.3d at 612 (citation and internal quotation marks omitted).

The magistrate judge dismissed Plaintiff-Appellant Todd Brooks because he was unable to be physically present at trial. Appellants argue that Brooks's individual testimony was unnecessary because it would have been "cumulative and redundant": he, like

all the other plaintiffs, would have testified that he was denied promotions for which he was qualified and that he believed those denials were racially-based. His testimony, Appellants insist, would have been required only if the trial had proceeded to the damages phase.

This argument is without merit. Although Brooks most likely would have testified to being denied promotions in much the same way as the other plaintiffs allegedly were, his testimony would not for that reason have been "cumulative" or "redundant." As a plaintiff in this action, Brooks was required to prove that DFAS-CO's allegedly discriminatory promotions policy injured him in some way. Whether Brooks was denied promotions for which he was qualified was an issue of fact for determination in the trial's liability phase.

Appellants further argue that instead of dismissing Brooks, the trial court should have admitted his affidavit into evidence. Quoting *McIntyre v. Reynolds Metals Co.*, 468 F.2d 1092, 1094 (5th Cir. 1972), Appellants maintain that the affidavit would not have been inadmissible hearsay because "[w]hen a witness . . . affirms the truth of a prior statement, the earlier statement is to be considered not only as bearing on the credibility of the witness but also as affirmative evidence." *McIntyre*, however, addressed a situation where a deposition witness explicitly affirmed a prior statement, and opposing counsel had the opportunity at the deposition to cross-examine the witness regarding the statement. Here, the Secretary never had the opportunity to cross-examine Brooks about the statements in his affidavit. Appellants argue that the Secretary could have deposed Brooks if he had wished, but this argument misses the mark — a defendant

does not waive a hearsay objection by waiting to confront a plaintiff at trial. The magistrate judge did not abuse his discretion in dismissing Brooks.

CONCLUSION

Accordingly, this Court **AFFIRMS** the judgment of the district court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

Civil Action 2:98-cv-799

[Filed January 5, 2007]

Willie S. Phillips, *et al.*,	)
	)
Plaintiffs	)
	)
v.	)
	)
Robert Gates, Secretary, Department of Defense,	)
	)
Defendant	)
	)

Magistrate Judge Abel

Opinion and Order

Plaintiffs bring this employment discrimination action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-16. Plaintiffs are employees of the Defense Finance and Accounting Service, Columbus Center ("DFAS-CO"), an entity within the Department of Defense under Secretary Robert Gates, the defendant. Plaintiffs allege that between 1990 and

1996 DFAS-CO discriminated against African-American employees by using policies and practices that had a disparate impact on their ability to obtain promotions. This case was tried to the Court beginning January 23, 2006.

I. Allegations in the Amended Complaint

Plaintiffs Lerdon Woodfolk, Jean Washington, Marcia Spence, Lisa Prater, Mary Phillips, Linda R. Pettes, Carilsa Miles, Susan McNeal, Jackie McGrady, Kevin Gray, Denise Goudy, Richard W. Goudy, Emma Fields, Yulander Edwards, Lori Dillard, Todd Brooks, Curtissene Anderson and Willie S. Phillips filed an amended complaint on October 15, 2002 (doc. 37).[1]

The Defense Finance Accounting Service was created in 1991 as an independent agency within the United States Department of Defense ("DOD"). DFAS's headquarters are located in Arlington, Virginia. There are five main centers, one of which is located in Columbus, Ohio. DFAS pays Department of Defense contractors and vendors, provides accounting services, and disburses money for smaller DOD agencies. Am. Compl. ¶¶ 12-13.

---

[1] Jean Washington, Curtissene Anderson, Linda R. Pettes, and Richard W. Goudy were dismissed because they lacked standing. *See Phillips v. Cohen*, 400 F.3d 388, 397 (6th Cir. 2005). Jean Washington was reinstated as a party plaintiff. *See* doc. 103. At trial, the Court granted defendant's motion for a directed verdict at trial with respect to plaintiff Todd Brooks. Mr. Brooks did not attend the trial, and no evidence was presented with respect to his claim. *See* IV-96:16-102:8. Jean Washington, Emma Fields, and Lori Dillard also failed to appear for trial.

When DFAS-CO was created in 1991, there was not a workforce already established in Columbus. *Id.* at ¶ 14. DFAS-CO began with a workforce of 400-500 employees, many of whom were transferred federal employees from Atlanta, Boston, Los Angeles and elsewhere. *Id.* at ¶¶ 16 & 19. Plaintiffs state that this initial workforce of transferred employees was racially diverse. *Id.* at ¶ 19. The workforce reached 3,500 employees in 1995. *Id.* at ¶ 16. Between 1991 and 1995, DFAS-CO hired approximately 3,000 new employees and offered many promotional opportunities. DFAS-CO hired an average of 70 employees per month between 1991 and 1995. *Id.* at ¶ 20.

African-American employees of DFAS-CO believed that they were not getting the same promotional opportunities as white employees. *Id.* at ¶ 23. Plaintiffs believed that white employees who were hired with no prior experience were promoted more rapidly and progressed at a faster rate than African American employees. Plaintiffs believe that African American employees trained white employees who then became their supervisors. Plaintiffs also maintain that there was favoritism and nepotism in the hiring and promotion process. *Id.* They allege that there were abuses of the detail process. Detailing is a policy that permits a manager to fill a position without posting a position for competitive bidding. Plaintiffs allege that once a position was filled by detailing, that person was in a more favorable position to get the ultimate promotion. *Id.* at ¶ 35. As a result of these employment practices, the complaint alleges, "white employees at the GS-6 through GS-12 Grades were disproportionately chosen over qualified African-Americans for promotions." *Id.* at ¶32.

Further, "African-Americans are under-represented at the GS-13 through GS-15 Grades due to unlawful discrimination." *Id.* at ¶31.

On December 6, 1996, Charles Coffee, Director of DFAS-CO, set up a Process Action Team ("PAT") to review and evaluate DFAS-CO's merit promotion policy and procedures. *Id.* at ¶ 26. Among the matters it investigated were whether only non-minorities were advancing to GS-11 level and above and whether there were any patterns of discrimination in management selection. On March 3, 1997, PAT issued its report. *Id.* at ¶ 50.

On March 5, 1998, each plaintiff contacted DFAS-CO Equal Employment Opportunity officials with an informal complaint. After receiving informal counseling, plaintiffs filed a formal individual and group complaint with the EEOC. *Id.* at ¶ 51. On August 7, 1998, plaintiffs filed this action. Plaintiffs maintain that DFAS-CO's discriminatory employment policies and practices have routinely resulted in the selection of whites over qualified African Americans, and these specific employment practices have had and continue to have a disparate impact on African American employees. *Id.* at ¶¶ 52-53.

II. Arguments of the Parties

A. Plaintiffs

To show that defendant's promotion practices had a disparate impact on African Americans, plaintiffs rely on the conclusions of the PAT report, statements made by Ida Faye Groves in a presentation to DFAS headquarters, the EEO report, and a statistical report

prepared by their expert, Dr. Ramona Paetzold. Plaintiffs argue that Dr. Paetzold presented statistical proof that African Americans were promoted at a statistically significantly lower rate when compared to white employees. The defendant's approach, on the other hand, was less reliable and criticized by the Sixth Circuit.

Plaintiffs contend that this Court should determine whether defendant violated Title VII based on evidence showing that African American employees were promoted less frequently than white employees; that factors in the promotions process, including awards and discipline, disadvantaged African Americans because of racial differences in application; and that employees perceived favoritism and a lack of transparency as pervading the promotion process.

Plaintiffs ask the Court to admit the testimony of Delana Taylor to rebut defendants' assertions that PAT documents were inadvertently lost and that the applicant flow data was destroyed pursuant to DFAS-CO's customary document destruction policy. Taylor testified that she read a letter indicating that the PAT report placed DFAS-CO in a "bad light" and should be "sanitized." Plaintiffs maintain that Taylor's testimony is admissible pursuant to Rules 803(1) & (2), and 807 of the Federal Rules of Evidence.

Finally, plaintiffs argue that the Court should sanction defendant for destroying evidence by awarding plaintiffs their expert and attorney fees, or in the alternative, finding liability on behalf of defendant. Plaintiffs maintain that it was clear that they were prejudiced as a result of the destruction of the documents. The prohibition against destroying

relevant evidence once litigation has begun is clear. Plaintiffs also rely on sections 1607.1 and 1607.14 of the Code of Federal Regulations to show that defendants were obligated to preserve promotional records.

B. Defendant

Defendants argue that plaintiffs have failed to establish all of the elements of disparate impact by a preponderance of the evidence. Defendants maintain that plaintiffs have not demonstrated that the elements of the promotion decisionmaking process at DFAS-CO are incapable of separation for analysis, nor have they established that specific DFAS-CO employment practices had a disparate impact on whether African Americans were promoted as required by *Watson v. Fort Worth Bank & Trust*, 487 U.S. 877, 994 (1988).

Defendants also argue that plaintiffs have failed to establish the existence of a disparate impact as a result of the facially neutral employment practices. Defendants contend that the evidence in the record, both statistical and non-statistical evidence, fails to establish any disparate impact on African Americans at DFAS-CO from 1992 to 1996.

Defendant maintains that the statistical analysis performed by Dr. Ramona Paetzold, plaintiff's expert, was flawed, and that defendant's expert provided a more credible analysis. Defendant argues that the single pool approach employed by Dr. Paetzold failed to account for the importance of grade and series. Under her analysis, all employees at DFAS-CO were equally likely to apply for all positions. Defendant

maintains that DFAS-CO employees simply were not all equally likely to apply for all positions, and Dr. Claudy's approach better approximated who comprised the actual applicant pool.

Defendant maintains that Dr. Claudy made the functional equivalent of the type of analysis the Sixth Circuit stated was required in a disparate impact statistical analysis, and plaintiff's expert did not. Instead, Dr. Paetzold said that the prescribed analysis was impossible under the circumstances and compared recipients of promotions to the total number of employees at DFAS-CO. Defendant argues that promotional policies cannot have a disparate impact on employees who have never applied for a promotion, so the appropriate analysis compares the ratios for African Americans and non-African Americans of the number of each promoted to the number of each seeking them. Finally, defendant maintains that the constructed pool approach used by Dr. Claudy does not warrant suspicion under *Mozee v. Am. Commercial Marine Serv. Co.*, 940 F. 2d 1036, 1045 (7th Cir. 1991).

Defendant also argues that the non-statistical evidence in the record, including the PAT report and anecdotal evidence offered by plaintiffs, does not provide credible evidence of disparate impact. According to defendant, the PAT team failed to employ any commonly accepted analytical procedures such as surveying a truly random sample of employees; examining applicant flow data from randomly selected promotions; and conducting statistical analysis of the available data in terms of standard deviation or employing a statistician to do so. Consequently, defendant maintains that the accuracy and reliability of the PAT report's results are questionable at best.

Defendant further argues that the anecdotal evidence of plaintiffs' individual experiences applying for promotions is irrelevant to a disparate impact analysis.

With respect to sanctions, defendant maintains that the evidence presented at trial clearly established that the evidence in existence at the time of the Court's preservation order would have been useless for a disparate impact analysis. Consequently, defendant argues that sanctions are not warranted.

III. Plaintiffs' Motion for Sanctions

This suit was filed August 7, 1998. Plaintiffs served interrogatories and requests for production of documents on September 2, 1998. Defendant did not timely respond to them. On December 7, 1998, plaintiffs filed a request for status conference regarding defendant's failure to respond to the outstanding discovery requests (doc. 6). On December 15, 1998, defendant filed a motion for protective order staying discovery until the Court had ruled on its November 2, 1998 motion to dismiss or, in the alternative, for summary judgment (doc. 7). On December 18, 1998, I issued a Discovery and Scheduling Conference Order that granted defendant's motion for protective order "on the condition that defendant's counsel locate and gather all documents responsive to the discovery requests and produce documents responsive to it **within eight (8) business days of the Court issuing any decision denying the pending motion to dismiss/for summary judgment**" (doc. 8).

On April 24, 2003, plaintiff filed a motion for sanctions because defendants failed to preserve the following evidence:

(1) The Job Opportunity Announcements of the Columbus Center for Fiscal Years 1995 & 1996; reviewed by the PAT members listed in the PAT Report bibliography;

(2) The Certificate of Referrals of the Columbus Center for Fiscal Years 1995 & 1996 reviewed by the PAT members listed in the PAT Report bibliography;

(3) Any of the "Other data, such as discipline, awards, referrals, selections, and performance ratings, that required manual compilation and stratification" mentioned in the PAT Report;

(4) The "data readily available through current databases, such as DBMS" mentioned as reviewed by the PAT members;

(5) Any of the four hundred and twenty seven (427) completed survey forms of the DFAS Columbus employees;

(6) Any documents regarding the one hundred and eighteen (118) individual interviews with employees;

(7) Any of the documents provided by the employees that were received by PAT members Togar and Associates;

(8) The spread sheets created by Togar and Associates for the PAT Report; and

(9) DFAS Columbus merit promotion records prior to October 1998 which were apparently destroyed after two years pursuant to "DFAS' internal Regulation 1402.1."

In their April 24, 2003 motion, plaintiffs argued that defendant has failed to respond to their September 2, 1998 discovery request and to comply with the Court's December 18, 1998 Order. Plaintiffs maintained that defendant had lost or destroyed documents that were responsive to the discovery requests. Plaintiffs requested that the Court enter judgment in their favor or, in the alternative, strike the report of defendant's expert and admit the report of plaintiffs' expert as a true statement of the statistical evidence in this action.

On July 2, 2003, I granted plaintiffs' April 24, 2003 motion for sanctions but deferred imposing sanctions until trial because I could not determine to what degree the loss of the documents would prejudice plaintiffs. *See* doc. 78. On August 3, 2003, defendant's motion for summary judgment was granted, and as a result, I did not revisit what sanctions were appropriate in light of defendant's failure to comply with the December 18, 1998 Discovery and Scheduling Conference Order. The Sixth Circuit, however, found that I erred by not making an assessment of the

quality of the evidence lost and determining the appropriate sanctions to be imposed on defendant for failing to comply with the Court's Order.

Trial Testimony. Items 1 through 8 on plaintiffs' list of allegedly lost or destroyed documents relate to materials gathered by the consulting firm Togar and Associates ("Togar") in the course of the preparation of the January 24, 1997 PAT report that was released March 3, 1997.[2] Plaintiff initially alleged that defendant lost these materials, although plaintiffs now assert that these documents were purposefully gathered in an effort to "sanitize" the PAT report. These documents were at some point in the hands of Togar and Associates. Thomas Gary, who founded and is employed by Togar and Associates, testified at trial that he had the survey sheets placed in two corrugated boxes and shipped to his home. Tr. Vol. I at 168:13-17. The employees who responded to the survey were promised that their response would be kept confidential. Mr. Gary believed that if the surveys were left at DFAS-CO, the employees might be subjected to retaliation against for the comments they made in their written responses to the questionnaire. Tr. Vol. I at 168:19-25 and 169:1-17. He kept the documents at his home for some unknown period of time until he received a letter from Mr. Coffee instructing him to forward the documents to DFAS headquarters in Virginia. Tr. Vol. I at 1701-7. Mr. Gary testified that he sent the documents as requested

---

[2] On March 3, 1997, PAT released a 121-page report. It indicated that considerable data was examined during the investigation. Survey forms were completed by 427 DFAS-CO employees. PAT also interviewed 118 employees. About 30 employees provided documents to PAT.

and could not explain why the documents were never located. Tr. Vol I at 170:7-18.

Both experts indicated that even if the survey documents were accessible, these documents would not assist them in determining whether or not the promotion process had a disparate impact on African-Americans at DFAS. They would have preferred to have applicant flow data, the Job Opportunity Announcement (which includes job qualifications), all applicants, those eligible for the position, those qualified for it, the certificate of referral (the top 15 applicants plus ties), and the applicant selected. Tr. Vol. IV at 113:17–114:15.

Dr. Claudy testified that the PAT report did not provide information that indicated whether or not management selection patterns were discriminatory:

> Q. Is there any information on these pages, that is 37 through 38, covering the issue of, are management selections patterns discriminatory, to suggest that the polices and/or practices of DFAS have an adverse impact on African Americans?
>
> A. There is really no information here that allows you to makes those inferences about adverse impact. There is no statistical information here, there is no inferential statistics here.
>
> Q. Can the conclusions of the PAT report be compared with your own? Are we talking about the same thing?

A. My report focused on answering a fairly specific question, whether during the time period from 1992 through '96, fewer African Americans were selected for promotion than would have been suggested by chance, given there representation in the work force. The PAT report looks at all sorts of different allegations that were made, but it does it using purely descriptive statistics. It looks at only '94 – or '95 and '96, I'm sorry, rather than the entire time period, and it uses a single pool rather than breaking them out.

The result – this really doesn't – this report was not designed to answer the allegations in the subject that we are here litigating today.

Tr. Vol V at 60:7-61:9.

Dr. Claudy further testified that even if he had access to the approximately 427 completed surveys from interviews with DFAS employees in 1996 about their com plaints or concerns, these documents would not have been relevant to a statistical analysis of promotions. Tr. Vol. V at 62:1-5. He also would not have used data on discipline, awards, and performance ratings of DFAS employees had it been available. Tr. Vol. V at 61:22-25.

The PAT team also viewed documents relating to approximately thirty specific promotions as a result of individual complaints about the selection process. Dr. Claudy testified that these thirty Job Opportunity

Announcements ("JOAs")[3] would not have been useful in determining whether there was disparate impact in the promotion practices for African Americans from 1992 to 1996:

> Q: How about approximately 30 files from 30 promotion selections, taking place between 1995 and 1996 and pulled for the principal reason that the non-selectee had complained. These selected files would include all of the applicants, all of the eligibles, all the referred and the selectee for just those 30 promotion selections?
>
> A. If those same files had been available for the other 3000-plus vacancies, yes. But under the circumstances, those 30 by themselves, they represent a 1 percent sample that was not selected randomly but were only selected from two of the years, no. They would not have provided any useful information for an applicant flow analysis of the process from '92 to '96.

Tr. Vol V at 62:10-22. Dr. Claudy also testified that the certificates of referrals would not have improved his analysis. With respect to the applicant flow for the last four or five months of 1996, Dr. Claudy testified:

> A. Well, again, if we had all of those folders for all of the years, I would want them. But what was going on in the last four or five

---

[3] The terms JOAs and applicant flow data were used interchangeably throughout trial. *See* Tr. Vol V at 62:13-15.

months of a '92 to '96, that's a five-year time period inclusive, four or five months does not represent an accurate picture of what was going on during that entire time period. So, no.

Q. Would it even give you an accurate perception of what was going on in 1996?

A. No. It would only - - it might give you some perception of what was going on in those four months or five months but not for the year as a whole, no, and certainly not for the whole time period.

Tr. Vol V at 63:24-25–64:1-10.

Dr. Paetzold agreed that data on discipline, awards, and performance ratings for DFAS employees for 1995 and 1996 by themselves would not have been helpful. Tr. Vol. VI at 41:9-13. She also stated that the approximately 427 completed survey forms or the notes taken when they were filled out would not have been useful to her analysis. Tr. Vol. VI at 41:14-20. Dr. Paetzold acknowledged that the thirty JOA files viewed by the PAT team would not have provided reliable conclusions with respect to whether there was a disparate impact in 1995 or 1996.

Q. How about approximately 30 files from 30 promotion selections taking place between 1995 and 1996 and pulled for the principal reason that the non-selectee had complained? These selected files would include all of the eligibles, all of the referred and the selectee for 30 promotion selections?

A. So, it had the actual outcome of who was selected for the promotions?

Q. For 30 files based on complaints from non-selectees for, you know, randomly for two years, '95 and '96?

A. And the data for those who weren't selected would have been available, also?

Q. Yes, ma'am.

A. I could have isolated those and analyzed those separately, yes.

Q. Could you have to come to a reliable result for 1995 with that data?

A. No.

Q. How about 1996? I'm sorry, I missed your answer.

A. No. I am assuming that that's not a complete set of data. But that would have given me some very specific separate information, but I don't know that I could have made a full determination for 1995 or 1996.

Tr. Vol. VI at 41:21-42:18.

Derek Saunders and Carol Scott testified that the applicant flow data was routinely destroyed two years following the close of the application period for the position in question. Both Saunders and Scott also testified that the PAT did not review or access the

complete applicant flow data for the years 1995 and 1996, even though the bibliography of the PAT report references "Job Opportunity Announcements of the Columbus Center for Fiscal Years 1995 & 1996." Pls. Ex. 4

Plaintiffs offered the testimony of Delana Taylor to rebut defendant's evidence that the underlying PAT data was destroyed through routine DFAS data retention and destruction practices. Ms. Taylor testified as follows. As Director Tom O'Brien's secretary, she handled all of the incoming mail to the director's office. When opening the mail, she came across a letter from DFAS headquarters which discussed the PAT report. The letter indicated that the PAT report had put DFAS in a bad light. March 17, 2006 transcript at 10. The writer indicated that the PAT report should be "sanitized" and the records should be collected. *Id.* at 11. Ms. Taylor could not recollect who wrote the letter or to whom it was addressed, although she surmised that it was directed to either Mr. Coffee or Ida Fay Groves.

Thomas O'Brien testified that he never received the letter described by Ms. Taylor. He said that he would have remembered such a letter because it would have been "totally inappropriate." *Id.* at 24:21-24.

Discussion. Defendants argue that the Court should not admit the testimony of Delana Taylor. Plaintiffs offered her testimony to rebut defendant's evidence that the underlying PAT data was destroyed according to regular agency regulations, but was, instead, destroyed in an effort to minimize the impact of the PAT report and sanitize its contents. Defendant argues that the issue of whether the PAT data was

destroyed pursuant to agency regulations or an alleged directive to gather and destroy the documents has been contested since 1998. Ms. Taylor informed plaintiff Miles of the alleged letter no later than 2000. Ms. Taylor left DFAS-CO in 2000, and therefore could not have any fear of retaliation in the event that she testified. Plaintiffs, however, failed to disclose Ms. Taylor or the existence of the alleged letter until the week of trial. Defendant maintains that plaintiffs were obligated to disclose Ms. Taylor as a potential witness.

Defendant also argues that Ms. Taylor's testimony constitutes inadmissible hearsay. Plaintiffs maintains that Ms. Taylor's testimony is admissible pursuant to Rule 803(1), (2), and 807 of the Federal Rules of Evidence. Plaintiffs argues that Ms. Taylor specifically recalled the use of the word "sanitized," which falls within the hearsay exception for a present sense impression under Rule 803(1). Defendant maintains that Rule 803(1) is not applicable because Ms. Taylor is not the declarant, and the author of the alleged letter was not describing or explaining an event or condition while the author was perceiving the event or condition. Consequently, Ms. Taylor's impression upon reading the letter is irrelevant to the hearsay analysis.

Plaintiffs also argue that Ms. Taylor's testimony is admissible as an excited utterance under Rule 803(2). As noted above, Ms. Taylor is not the declarant. Instead, she is testifying about someone else's statement. Rule 803(3) would be implicated if the author had written the letter shortly after a startling event.

Finally, plaintiffs argue that Ms. Taylor's testimony is admissible under Rule 807 because there are

"equivalent circumstantial guarantees of trustworthiness." Fed. R. Evid. 807. Rule 807 states:

> [A] statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Having considered the parties' arguments, I conclude that Ms. Taylor's testimony was not rebuttal evidence. Plaintiffs had the duty to disclose her as a potential witness and failed to do so. Alternatively, Ms. Taylor's testimony is not admissible based on any exception to the hearsay rules argued by plaintiffs.[4] Her testimony lacked corroborating detail. Ms. Taylor knew neither the sender or the recipient of the letter. She read just a portion of it. Her recollection of its details is sketchy. While I believe Ms. Taylor testified truthfully, her testimony falls well short of establishing that DFAS intentionally destroyed data collected by the PAT team.

---

[4] However I do note that if the letter had directed the recipients to collect and destroy the documents gathered by the PAT team, the statement would not be offered for the truth of the matter stated. Rather, it would have been offered to prove that the direction to destroy the documents had been given. But Ms. Taylor's testimony falls well short of proof by a preponderance that the letter directed high level supervisors at DFAS-CO to destroy PAT report data.

Having determined that plaintiffs have failed to prove that defendant intentionally destroyed the PAT data, I turn to the question of what sanction is appropriate for defendant's failure to take action to preserve the documents. It is undisputed that the best data to assess whether DFAS promotion practices had a disparate impact would have been all the applicant flow data from 1992 through 1996. Plaintiffs argue that DFAS-CO should have known that the applicant flow data might be relevant to future litigation. First, Director Coffee's December 6, 1996 memo regarded an investigation to determine whether management selection practices were discriminatory. Second, plaintiffs' March 5, 1997 EEO complaint, Pls. Ex. 1, put DFAS-CO on notice that litigation over whether those practices were discriminatory was possible. Pls. Ex. 9. However, assuming that the government's record retention and destruction policy was followed, at the time the PAT team began gathering information the applicant flow data for 1992 through 1994 would already have been destroyed. Tr. Vol. IV at 126:16-20. When the EEO complaint was filed in mid-1997, applicant flow data from only part of 1995 and all of 1996 would have been available. Tr. Vol. IV at 126:3-20. In August 1998, when this suit was filed, all applicant flow data through the first three quarters of 1996 should have been destroyed. Tr. Vol IV at 127:12-14 and 22-25. By December 1998, when the Court ordered defendant to preserve documents responsive to plaintiffs' September 2, 1998 written discovery requests, all applicant flow data from 1992-1996 should have been destroyed. Tr. Vol. IV at 127:2-4.

Based on the experts' testimony that they needed the applicant flow data from substantially the entire

period 1992-1996 to make a statistical analysis of competitive promotions and the destruction of most of that data in accordance with DFAS's records retention policy before the PAT team began collecting information, I conclude that the evidence does not support plaintiffs' position that the PAT documents would have assisted the finder of fact with determining whether or not the DFAS promotion practices had a disparate impact on African Americans from 1992 through 1996. The PAT team looked at no applicant flow data from 1992-1994. Despite the PAT report bibliography's reference to "Job Opportunity Announcements of the Columbus Center for Fiscal Years 1995 & 1996," the testimony of Thomas Gary, Derek Saunders, and Carol Scott at trial establishes by a preponderance of the evidence that the PAT team did not review the entire applicant flow data for 1995 and 1996. Mr. Gary indicated that the two boxes of documents were primarily the completed surveys and corresponding notes. Had Mr. Gary retained copies of all the applicant flow data for 1995 and 1996 in addition to the 427 completed surveys, all these documents could not have been stored in two boxes. Furthermore, Mr. Gary testified that the reason he took the surveys was his concern with protecting the confidentiality of information provided by the survey respondents. The applicant flow data was accessible by DFAS management and maintained by the Human Resources department. Mr. Gary had no motive to take the applicant flow data to protect DFAS employees from retaliation from management.

Both experts agreed that neither the approximately 30 Job Opportunity Announcement files reviewed by PAT nor the completed surveys and corresponding notes would have assisted them in analyzing the

promotion rates of African Americans at DFAS from 1992 through 1996. Even if the applicant flow data that was extant at the time PAT convened was available, both experts agreed that they would have had insufficient data to extrapolate findings regarding the five years of promotions at issue in this litigation.

It is undisputed that some documents responsive to plaintiffs' September 2, 1998 first request for production of documents and first set of interrogatories were lost and that defendant failed to take steps in December 1998 to preserve the documents and other information needed to respond to those discovery requests. Had defendant's counsel complied with the Court's December 18, 1998 Discovery and Scheduling Conference Order, it seems probable that the documents would have been located and preserved since plaintiffs served their document requests on September 2, 1998 and Gary had them in his possession until at least late 1997 or early 1998. Had a search been instituted in December 1998 as my Order, the Rules of Civil Procedure, and the case law regarding preservation of evidence require, it could have been quickly determined that Gary took possession of the PAT surveys and, perhaps, some other documents related to his investigation in or about January 1997. Had he been contacted in December 1998, his memory about the whereabouts of those documents would have been fresh. If, as he testified, he had received a letter directing him to send the documents to DFAS headquarters in late 1997 or early 1998, he would likely have remembered the details and the records could well have been located. If, contrary to his testimony, the records were still in storage at Togar and Associates, he could have turned them over to defendant's counsel.

My July 2, 2003 Order concluded that the "fault lies with defendant for the loss of the survey forms, documents from DFAS-CO employees, spread sheets, documents provided by DFAS to Togar and Associates, and other documents developed by Togar and Associates." (Doc. 78, at p. 13.) It does not expressly address plaintiff's request for sanctions based on the destruction of the applicant flow data for 1992-1996. Plaintiffs, who were represented by counsel during the proceedings on the EEO complaint, did not then ask for applicant flow data, and they did not ask that applicant flow data for 1992 through 1996 be preserved. None of the discovery requests plaintiffs had served on defendant on or before December 18, 1998 sought applicant flow data. They did seek the personnel files of the individual plaintiffs, but there is no evidence that applicant flow data would have been in those files. Although, the July 2, 2003 Order asserts that "plaintiffs' discovery requests encompassed promotion records." That statement is accurate insofar as records relating to the fact that an individual plaintiff was promoted would be contained in that employee's personnel file, but it is inaccurate if it taken to mean that plaintiffs' discovery requests sought the applicant flow data that the experts needed to make a statistical analysis of the promotions made during the period 1992-1996.

Even though plaintiffs had not sought applicant flow data in their first wave of written discovery, defendant may have had an independent legal duty to preserve it. Generally, a party has the duty to preserve documents once it knows that they are relevant to resolution of the claims and defenses raised in a lawsuit. *See Broccoli v. Echostar Communications Corp.*, 229 F.R.D. 506, 510 (D. Md. 2005). Here the

expert testimony and the case law, both of which base a disparate impact analysis on a comparison of the promotion rates of members of the protected class with that of employees who are not a member of the protected class, strongly support the existence of a duty to preserve the applicant flow data. Defendant's counsel should have recognized that the applicant flow data was essential to a factual determination of plaintiffs' disparate impact claim.

Plaintiffs argue that under 29 C.F.R. § 1607.1 *et seq.* and § 1607.4(A) as interpreted in *Wards Cove*, 490 U.S. at 657-58, DFAS-CO had an obligation to retain applicant flow data. Plaintiffs alleged disparate impact in their EEO charge and the complaint initiating this lawsuit. The best evidence to prove–or disprove–disparate impact is a statistical analysis of the ratio of the number of minorities promoted to the number of minorities seeking promotion compared with the ratio of the number of non-minorities promoted to the number of non-minorities seeking promotion. Applicant flow data is the best evidence to use for that analysis.

At this stage of the proceedings, plaintiffs argue that the Court should sanction defendant for its destruction of evidence by awarding plaintiffs their expert and attorney fees, or in the alternative, finding liability on behalf of defendant.[5]

Rule 37(b)(2) of the Federal Rules of Civil Procedure provides in pertinent part:

---

[5] In my July 2, 2003 Order, I determined that an entry of judgment against defendant was not warranted.

(2) Sanctions by Court in Which Action is Pending. If a party . . . fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

. . .

In lieu of any of the foregoing orders or in addition thereto, the court shall require the

> party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

When the PAT team convened in December 1996, Mr. Saunders testified that only applicant flow data from 1996 and part of 1995 was available. Tr. Vol. IV at 126:3-20. And, on March 5, 1997, when plaintiffs filed the class complaint with the EEO counselor, DFAS would only have had JOAs from 1996 and part of 1995. Of the thousands of JOAs for the five year period 1992-1996, there were only something over 100 JOAs in fiscal year 1995 and just 57 in fiscal year 1996.[6] Tr. Vol. IV at 122:17-19. As previously noted, both experts testified that this data would not have provided sufficient information from which one could draw conclusions regarding the entire period that is the subject of this litigation. Even so, defendant should have known that this data would play a central role in this case, and consequently, as I previously ruled, sanctions are warranted.

Mr. Saunders also testified that the PAT report did not rely on all of the applicant flow data that was still in existence. He testified that he was the sole person who retrieved applicant flow data from the Human Resources office for the PAT team. He further testified

---

[6] The PAT report would reverse these numbers. It states that there were 57 Job Vacancy Announcements in FY 95 and 134 in FY 96. Pls. Ex. 4 at 15.

that he only pulled approximately 30 JOAs for review by the PAT team. These 30 JOAs were selected because the PAT team received employee complaints of favoritism or other partiality in the selection process for these promotions. Tr. Vol. IV at 118-120. Togar and Associates then selected the portions of the JOAs they wanted to copy.

Although the record establishes that the PAT team reviewed partial data provided by Mr. Saunders regarding approximately 30 specific promotion decisions, there is no evidence that the PAT team reviewed any other applicant flow data. Although I do not believe that the PAT report's supporting documentation or the JOAs still in existence at the time this action was initiated would have provided the fact finder with the necessary data to assess whether promotional practices had a disparate impact on African Americans at DFAS, I do find that sanctions are warranted under the circumstances given defense counsel's failure to comply with the Court's December 18, 1998 Order. Had counsel located and gathered documents as she had been ordered to do, the Court would have had the benefit of viewing the supporting documentation without the need for extensive testimony and briefing with regard to its import.

As a sanction for this failure to comply with a court order, defendant is ORDERED to pay for all of plaintiffs' attorney fees and costs expended in litigating and briefing this issue, including plaintiff's expenses incurred with respect to offering rebuttal testimony by way of Ms. Taylor. However, I do not find that plaintiffs should be awarded their expert fees or that liability should be imposed as a sanction because the un-controverted expert testimony is that the

missing documents would not have provided the information needed to make a finding of liability. The applicant flow data for 1992 through 1996 would have served as the best evidence for determining whether or not DFAS promotion practices disparately impacted African Americans, and this data was not contained in the missing documents. Without the applicant flow data for 1992 through 1996, plaintiffs had little choice but to retain an expert to attempt to recreate what she believed that applicant flow data would have shown. Had plaintiffs obtained the applicant flow data from 1996 and a part of 1995, this expert analysis in all likelihood would still have been necessary for the years 1992-1994 and part of 1995.

As a further sanction, the Court accepts the statistical information contained in the PAT report as accurate. The Court also admits for the truth of the matter asserted therein the PAT report summaries of the employee statements complaining about employment practices that gave supervisors discretion which they believed had a disparate impact on them as African Americans.

Plaintiff is **ORDERED** to submit an itemized statement of such costs and fees and supporting memorandum **within ten (10) days of the date of this Order.** Thereafter, defendant may file a brief in opposition within seven (7) days of the date of service of plaintiff's statement and supporting memorandum.

IV. Findings of Fact

A. Overview

DFAS-CO performs centralized finance and accounting services for smaller agencies within the Department of Defense. It was created when DOD consolidated field offices and transferred their functions to DFAS-CO. Employees of the consolidated filed offices were offered the opportunity to transfer to Columbus, but fewer than 10 percent did. A large segment of those who transferred were African American.

During the period 1991-95, DFAS-CO hired around 3,000 employees, an average of 70 a month. There were many promotional opportunities. Tr. Vol. IV at 112:7-8. It was common to have upwards of 200 applicants for a vacancy. Tr. Vol. IV at 113:3-11, 171:19-172:11. Plaintiffs' perception was that new hires were from "off the streets" of Columbus. They were mostly Caucasian and had no prior government experience; yet plaintiffs believed they were promoted at a faster rate than African Americans who had transferred to DFAS-CO from other DOD facilities. Many plaintiffs testified that they trained whites who later became their supervisors. They believed that favoritism and other promotional practices limited their opportunities for promotion to GS-7 through GS-11 positions.

B. Plaintiffs' Testimony

Kevin Gray. Before coming to DFAS-CO, Gray was a Financial Accounts Clerk GS 4/5/6. Gray had a B.A. in business administration management and an M.S.

in information resource management. He was employed at DFAS-CO from 1990 to 2000. In 1996, Gray was selected for a 510 Accounting Technician position in another directorate. He ended his employment at DFAS-CO as a GS-11 in the Accounting Directorate. Gray applied for financial specialist positions with promotional potential to GS-11 in the 501 professional series. Tr. Vol. I at 22. During his 10 years at DFAS-CO, Gray applied for approximately 10 positions. Tr. Vol. I at 26. He testified that limited areas of consideration prevented him from applying for other positions. Tr. Vol. I at 43; Pls. Ex. 39.

Gray testified that persons holding an accounting technician position were rarely selected for professional positions. The 501 Financial Specialist series was similar to an accountant position. However, the 510 series was designated Accountants.

In 1994, Gray was a GS-7 Accounting Technician. After not being selected several times, Gray started gathering information about selection for jobs that he did not get. He found that the selected candidates often had a higher grade than that required to be qualified for the position. Gray applied for several positions where the Job Opportunity Announcement stated that a lower grade qualified for the position, but a higher grade employee was selected. Gray saw employees detailed into supervisory positions over him. He believed that selecting officials had a lot of discretion.

On one occasion, Gray applied for promotion as an accountant. Human Resources said he was not qualified, but after further review he was determined to be qualified. However, the selection had already

been made. The selected employee told Gray that he was a friend of the selecting official.

On another occasion, the employees selected had very limited experience, but the selecting official – a white female – said that the selected employee showed favorably from experience in another area unrelated to the job.

Gray was given priority consideration for the next promotion because of an EEO complaint, but a white female selecting official selected a white female with a higher grade for Vacancy No. 96-113 CJ. Pls. Ex. 39 at ¶ 7.

Gray believed that there was a pattern of selection that hindered minorities from receiving promotions to GS-7 through GS-11 positions. Consequently, few minorities were qualified to apply for GS-12 and higher up positions. Because of this belief, he and some 30 other African American employees met in 1996. They presented their concerns to Mr. Coffee, who then appointed the Process Action Team committee.

Yulander Edwards. Edwards began her federal employment in 1984 at a Department of Defense facility in St. Louis as a GS-3 file clerk. She has two years of junior college credits. When she transferred to Columbus in 1992, she was placed in a GS-7, 503 series position. She was then transferred from that lead position to a front pay monitor position. In late 1993, Edwards transferred back to a GS-7, 503 series lead position. In January 1995, she was reassigned to a GS-7, 525 Accounting Technician position, the same position she had held at the end of her employment in

St. Louis. In 2001, she was promoted to a GS-9, 509 position. Tr. Vol. II at 7.

From 1992 to 1995, Edwards applied for at least 10 promotions, but she received none. Tr. Vol II at 10. After that, promotional opportunities diminished. She applied several times for GS-7- target-11 501 series financial specialist positions and made the certification list. Tr. Vol. II at 13. Once the selecting official chose Michelle Kandrack, a white female, who had only two years of federal service. Edwards then had four years of qualifying experience. She applied for several 501 series jobs, made the certification list, but was told that they were not going to fill the position with that certification list.

Edwards applied for a 501 Financial Specialist target 11 position and was told that she was not qualified. Tr. Vol. II at 14. She applied for several other 501 Financial Specialist target 11 jobs and made the certification list. She applied for a GS-8, 525 series supervisory position and was told she was not qualified even though she had held a GS-7, 525 series position in St. Louis. Tr. Vol. II at 16. She applied for a personnel specialist position GS-5 target 11 and was told she was not qualified. Edwards believed that her being assigned to the 503 series before coming to Columbus prevented her from advancing. Tr. Vol II at 18.

Edwards was once detailed into a research supervisor position for 90 days, but she was removed after thirty days. Tr. Vol. II at 17. A white female with less experience was promoted to the financial specialist research supervisor position. She also testified that there were positions she could not apply

for because they were restricted to a limited area of consideration. Tr. Vol. II at 44.

Lisa Prater. Prater has a B.S. in business management. She began working at DFAS-CO in January 1991 as a GS-4, 503 series cash clerk in the Dispensing Directorate. After one year, she was promoted to a GS-5-target-6 financial accounts clerk and later to the GS-6. Tr. Vol II at 51; Pls. Ex. 45. Between 1990 and 1996, Prater applied for no less than 10 jobs. Generally, Prater was looking for a 501 series, GS-5-target-11 or 7-target-9 position. When she applied and did not get a job, Prater would often make an appointment with the selecting official to ask whether she had problems with the interview or other problems that might cause her to lose a promotion.

Prater was concerned that less well qualified candidates were selected for promotion because they were friends of the clique, were favored, or were preselected. She believed that Ida Faye Groves, Patsy Frisch, and Maura Shaffer, all white females, determined who was promoted in the West Directorate where she worked.

In 1996, Prater had problems with a white female supervisor who wanted to rate her "Fully," rather than "Exceptional." She also ranked high on the certification list for a 501 series 7-target-9 position (Job Announcement No. 96-018-AS) that was given to an intern who was a GS-4 or GS-5. Tr. Vol. II at 63:22–65:19. In May 1996, Prater ranked high on the certification list, but the promotion went to Michelle

Little, a white female, who ranked much lower.[7] In the same month, B. J. Johns, a white female, was a selected for a position on the same Job Opportunity Announcement as Ms. Little, even though she was lower on the list than Prater. Pls. Ex. 45 at ¶ 7.

Carlisa Miles. In July 1990, Miles started at DFAS-CO as a GS-5, 525 series Accounting Technician. Tr. Vol. II at 83; Plfs. Ex. 42. She has a B.S. in accounting and management. In 1991, Miles was promoted to a GS-6, 525 series Accounting Technician position. Later she applied for a GS-7/9/11 position, but she believes that the supervisor had already preselected Debbi Temesvary for the position. Tr. Vol II at 95. Miles was later promoted to a GS-7, 525 series Accounting Technician position in Stock Fund. Tr. Vol. II at 84. In 1994, she moved to another agency. She was absorbed back into DFAS-CO in November 1994 as a GS-7/9/11 accountant. Tr. Vol. II at 84. After that, she made a normal progression to GS-9, then GS-11. Then she was promoted to a GS-12 supervisor position. In June 2000, Miles left DFAS-CO. She is now a GS-13 Director for the Department of Navy, supervising 50 people who are graded GS-9/11.

Miles testified that during the period 1990-1996 she applied for hundreds of positions. In 1991, she applied

---

[7] Several plaintiffs testified that they learned that they ranked higher than applicants on a certificate of referral or higher than the applicant selected. While I do not doubt that someone may have told them this, I do not believe that fact is evidence of disparate impact. Although Human Resources did rank the candidates, the top 15 and ties were listed on the certificate of referral alphabetically. They were not ranked on the certificate, and the hiring supervisor was not told their rank.

for a GS-7/9/11, but a supervisor told her she was wasting her time. The supervisor said that a friend of the white male selecting officer was going to get the job. A white female who did not have a college degree was selected. Miles believed that her promotional opportunities were diminished when a supervisor gave her a "Fully" rating instead of a deserved "Highly"rating. Rather than adjust the rating, the supervisor gave Miles a cash award for duties she did not perform, which she refused. Pls. Ex. 42, ¶ 10.

Miles testified that when she worked under Ida Faye Groves in the Stock Fund Directorate, she was forced to train a lead, Judy Carnes, who was not qualified when placed in the position.

Miles testified that she once observed Tom Dorner, a white male, ask Bridget Watkins to look at a certificate list and tell him who she recognized as a Caucasian. Miles believed that supervisors promoted whomever they wanted to.

Jackie McGrady. McGrady transferred to DFAS-CO in September 1990 as a GS-6-target-11. Pls. Ex. 38. She had a bachelors degree in social work, 20 hours of course work in statistics, budgeting and accounting, plus years of accounting and budgeting experience. When she transferred to Columbus, she continued in the Grow Your Own Accounting program, which she had begun while working for the Department of Defense in Chicago. In 1992, McGrady dropped out of the program because she could not complete the course work while adopting a child. Tr. Vol. II at 159. She reverted back to the GS-6, 525 series position. In 1998, McGrady, still a GS-6, left DFAS-CO.

While at DFAS-CO, McGrady applied for several promotions. Tr. Vol. II at 161. Sometimes she was erroneously not placed on the certification list. Other times, another employee lateraled in. McGrady did not get superior and excellence performance appraisals as she had done in Chicago. She believed that non-minorities who were doing less work were given higher evaluations. McGrady testified that she and other African Americans were doing eight or nine times the work of those getting awards and better performance evaluations. She said that very few African Americans got awards. Their supervisors were people they had trained.

McGrady began creating her own database. She testified that more than 50-60 employees told her about their qualifications, but she could only name Stacy Tolson. McGrady further testified that she once analyzed the work production of employees in the unit where she worked. During a period of perhaps two years, she analyzed the work loads of about 60 employees.

McGrady testified that from 1992 to 1997, she made numerous applications for account technician and financial assistance positions. She applied for a supervisor position, but it was filled by a white female. In contrast, she testified that Amy Thomas, a white female, was detailed to a position, then she became a supervisor and moved up the chain of command. McGrady once got a temporary promotion to GS-7 because she was doing a difficult audit.

McGrady testified that Stacey Tolson got her job by favoritism. Either her father or her father-in-law was

the Director of Payroll; and she was close to Ms. Frisch.

Susan McNeal. McNeal's first federal employment was in 1985. Between then and June 1992, when she transferred to DFAS-CO, McNeal held a number of a clerical positions. Pls. Ex. 41. She has an associate degree in business administration. McNeal testified that she was told prior to moving to Columbus that she was eligible for positions as a 540 series voucher examiner, a 525 series accounting technician, and her then current 503 series position. She came in as a GS-4/5/6, in a 503 series position, as a G S-5. She became a GS-6 after nine months. She remained a GS-6 for 14 years. Tr. Vol. II at 236.

From 1992 to 1996, McNeal applied for 29 promotions. Tr. Vol. II at 215. She applied for positions as a contract input lead, management analyst, financial management central management intern, and financial specialist. Tr. Vol. II at 217 and 224. She testified, "At one point I was applying for everything." Tr. Vol. II at 251.

McNeal testified that although she was not promoted, people from off the streets were employed at DFAS-CO. She said that employees promoted to contract input technician positions had no relevant government experience before coming to DFAS-CO. For example, Robin Terry, a white female, advanced from a GS-4 to a GS-5 in six months.

Mary L. Phillips. Phillips transferred to DFAS-CO in August 1990. She has a high school education with some college and vocational training. Pls. Ex. 43. Phillips came in as a GS-5 in the 525 series. Tr. Vol.

III at 49. In October 1992, she became a GS-7/8 supervisor. Tr. Vol. III at 10,12-13. In 1999, she was promoted to GS-9. Tr. Vol. III at 49.

Phillips applied for promotions to positions as a 525 series accounting technician and a 501 series financial specialist. Tr. Vol. III at 9. She also applied for a recon technician position and a GS-9/11, 501 series position. Tr. Vol. III at 13. Phillips testified that in 1996 she applied for Vacancy Announcement No. 96-103R, a GS-5/7/9/11 financial specialist position in the 501 series. She was interviewed, but B. J. Johns, a white female, was selected. Phillips testified that she scored more points on the certification list than Johns. She said that she had more experience, interviewed well, and ranked higher than Johns. On cross-examination, Phillips testified that she had no complaints about her progression from a GS-5, to a GS-6, then to a GS-7.

Marcia Spence. Spence came to DFAS-CO as a GS-7, series 525, accounting technician. Tr. Vol. III at 65. When she was coming to Columbus, she applied for a GS-7/9/11, series 501, financial specialist position. Tr. Vol. III at 65. In May 1993, Spence was promoted to GS-9/11, 501 series position. Tr. Vol. III at 77.

Spence testified that she applied for several 501 series promotions. In November 1995, she applied for several GS-11-target-12 financial prevalidation specialist positions. Three people were selected for the positions, including Chris Carter, "employee X" in the PAT report. In December 1995-January 1996, Human Resources determined that Carter did not have the time-in-grade at GS-11, 501 series. Management then elected not to fill the position. In March 1996, Spence applied again for the same financial prevalidation

specialist position. She was interviewed, but Carter again was selected for the job. In November 2000, Spence became a GS-12, 501 series, Financial Systems Specialist. Tr. Vol. III at 76.

On cross-examination, Spence testified that the list of favored employees included maybe 15 names.

Denise Goudy. In August 1989, Goudy came to DFAS-CO as an input technician, GS-5, 503 series. She is a high school graduate with course work in business law and accounting principles. Pls. Ex. 38. In June 1990, Goudy received a competitive promotion to GS-6, 503 series. In late 1991, she became a lead input technician. In late 1992, she was promoted to control supervisor, GS-7, 503 series. In early1993, Goudy became a contract input supervisor, GS-8, 503 series.

In 1996, Goudy applied for a Financial Specialist position, GS-7/9/11, 525 series. Vacancy Announcement No. 96-103. The person selected scored a 47, which was well-below the JOA cutoff of 75.

Goudy's own experience as a supervisor was that no one exerted any pressure to select black or white job promotion applicants. Her division chief did remind her to give every qualified applicant fair consideration.

Lerdon Woodfolk. Woodfolk came to DFAS-CO in December 1990 in a GS-11, 501 series position. He had wanted to enter as a GS-11-target-12, but because of a delay in the completion of his security clearance the position was no longer available when he arrived in Columbus. Woodfolk is a high school graduate with three years of college and a number of Defense Acquisitions University courses. Pls. Ex. 48. In

February 1992, Woodfolk was promoted to a GS-12 Financial Specialist position.

Woodfolk testified that when he worked in North Fiscal Budget he instructed Tim Mock, a white male, about the budgeting process that he had helped set up. Mock then gained a temporary assignment to the position Woodfolk trained him for. Mock became a GS-13. Mock was selected for promotion by Nancy Drew, a white female, who had been an intern when Woodfolk worked at DCASR-Cleveland.

Woodfolk applied for a Supervisory Management and Program Analyst position, GS-13, 343 series. JOA 94-051-AS, Pls. Ex. 48, at 8. In February 1994-April 1994, he had been detailed to the position to assist the unit during its transition. Patsy Frisch, a white female, selected Jim Hunter, a white male, for the position.

Reba Rivera, who had no directly related experience, was selected over Woodfolk for a Supervisory Management Analyst position in the Stock Fund Directorate. Pls. Ex. 48, at 8. Woodfolk identified other job opportunities set out in Plaintiffs' exhibit 48 that he was denied. He further testified that Lou Ricks, Lori Hunter, Jeff Groslosc, Paul Huey and Greg Allen were examples of white employees who made rapid advancement from GS-5 through GS-9 to GS-13 and GS-15.

Woodfolk testified that he felt betrayed because he was a "good soldier." He described himself as a self-starter and an independent worker who got the job done. He believed his advancement should have been better.

Willie Phillips. Phillips transferred to DFAS-CO in September 1989 as an accounting technician, GS-7, 525 series. He is a high school graduate with three years of college as well as job-related education. In the fall of 1990, Phillips was promoted to Voucher Examiner Supervisor, GS-8, 540 series. In 1992, Phillips had a disagreement about supervision management practices and resigned the position. He reverted to his original accounting technician GS-7, 525 series position. Later that year, he was again promoted to a GS-8, 525 series position. Sometime during 1993-94, Phillips was reclassified to become a GS-9. In February 1996, Phillips became a financial prevalidation specialist, GS-9, 501 series.

Phillips applied for jobs in both the 501 and 525 series. He also applied for some jobs at a lower grade level because the target grade was higher.

Phillips testified that promotions at DFAS-CO were based more on who you knew, and who you hung out with, rather than job experience and qualifications. He believed that some favored employees were promoted through unearned awards, experience gained when detailed, and transfers between directorates.

Phillips also testified that promotional opportunities were restricted because some were available only to employees working in the directorate where the vacancy occurred. He believed awards have a large impact on promotions because the points given for awards boosted the applicant's rating. Discipline also impacts one's performance appraisal and the applicant's saleability to some extent.

Phillips' perception was that as new employees rapidly came into DFAS-CO, African Americans were not promoted as rapidly to middle manager positions. Phillips himself made the top three for several positions he applied for, only to have the select-ing official, Sue Jennings, a white female, recall the certification list. He also lost the opportunity to apply for promotion during a six-month period in 1996 because he was rated only "Met expectations." During the preceding three years he had been rated "Exceptional" twice and "Highly" once.

Phillips testified that when he worked for Pat Rose, she hired Recon Supervisors and clerks who had no experience. Philip showed them how to do the job, but he received a very bad rating. Phillips asked Steve Frisch for a transfer so he could apply for the same job in another division, but Frisch said that he was not in the habit of transferring. Yet a white male was permitted to transfer under similar circumstances.

C. Defendant's Witnesses

Derek Saunders. Saunders, an African American who worked for 11 years at DFAS-CO as a Human Resources Specialist, testified for the government about promotional practices and the operation of the PAT team. When there was a Job Vacancy Announcement, applicants would fill out a SF-171. It does not ask for the applicant's race. At no time is the applicant ever asked about his or her race. Human resources refers the top 15 applicants and ties to the selecting official by a Certificate of Referral. Applicants are listed alphabetically. They are not ranked by score. Tr. Vol. IV at 116:1-14. During the period 1990 through 1996, there were 50 Human

Resources Specialists who looked through applications and developed certificates of referral.

Plaintiffs testified that when a job vacancy occurs, an announcement is posted stating the minimum qualifications needed and the application deadline. *See* Tr. Vol. I at 27:2-28:21. A Human Resources Specialist reviews the applications, applies selection criteria, and ranks the top 15 candidates. *See* Tr. Vol. I at 28:22-I31:20. This list goes through the Human Resources office and equal employment office and is given to the supervisor in charge of filling the vacancy. The supervisor has the discretion to interview, or not interview, anyone on the list. He may request that more persons be added to the list. He may choose anyone on the list to fill the vacancy. *See* Tr. Vol. I at 31:21-32:8; 27:2-I32:8; 33:11-37:18; 42:13-52:2.

Saunders testified that each certificate of referral could include fifteen or more names. Tr. Vol. IV at 11:14-20. The top fifteen candidates plus ties were referred to the selecting official. *Id.*

DFAS-CO started with several hundred employees. It grew to 3600 employees in 1996. There could be hundreds of applicants for a specific Job Opportunity Announcement. It was not unusual to have over 300 applicants for a position.

Saunders was the Human Resources Specialist member of the PAT team. He was the only member of the PAT team who could get the JOA files. So all the JOA material came through Saunders to Togar and Associates. JOA files included the JOA Vacancy Announcement, the applications, those eligible for the positions, those qualified for it, the Certificate of

Referral, and the applicant selected from either 1995 or 1996. Tr. Vol. IV at 120:10-18; 130:5-21.

Around 30 issues were identified by Togar, so Saunders pulled about 30 JOAs. He testified that all the issues regarding the 30 JOA files are documented in the PAT report. He further testified that Togar did not say there was discrimination as to any of the 30 JOA files that the PAT Team looked at.

Saunders testified that when Togar asked for a JOA file, he got it. Saunders stayed in the room while Togar reviewed the file. He copied whatever Togar asked for, then returned the file. Togar kept the copies.

At the time Saunders was pulling the files, Human Resources would have had all of the JOA files for FY96 and 9 months of FY95.[8] There were no JOA files for 1990 through 1994 available. There were approximately 100+ JOA files for FY95 and 57 for FY96. *See* Tr. Vol IV at 120:19–121:24.

Section 41 of DFAS's Records Management Administrative Procedures provides that JOA files are destroyed two calendar years after the JOA vacancy announcement closed. Assuming that policy was followed, in August 1998 only the JOA files from the last quarter of 1996 would have been available. During the entire year 1996, there were only 57 JOA files. In September 1998, all of the JOA files from 1992 through 1996 would have been destroyed.

---

[8] The Fiscal Year begins October 1. In December 1996, it was FY97.

The standards for job series are set by OPM. The 501, 503, 510, and 511 series are two-grade interval series. The 501 and 503 series are a combination of two or more different positions and duties in one position. The 510 series is for accountants, and the 511 series is for auditors. The 525 series is for accounting technicians, and the 540 series is for voucher examiners. Line employees in the 525 and 540 series go up to GS-7. Supervisors are GS-8s or GS-9s, but rarely GS-10s. Generally, an employee must have one year in grade or specialized experience to be eligible for promotion to the next grade. Because of this requirement, it is rare that an applicant would be eligible for a two-grade promotion.

Saunders testified that when EEO notified Human Resources that an EEO charge had been filed regarding a specific JOA file, that file would be preserved.

Carol Scott. Scott, who was an EEO Specialist in 1996 and a member of the PAT team, testified for the government. She said that the EEO MAS database had no information from the JOA files. EEO recorded race, nationality, gender and age information for the top 15 applicants. It had no information about other applicants eligible for promotion who did not make the Certification of Referral. The EEO office did not store JOA files. It would check out JOA files, if needed, for review in connection with an investigation.

D. The PAT Report

African Americans were concerned that few African Americans were being promoted to higher GS levels. Pls. Exs. 8-11. Director Charles Coffee formed the PAT

team to investigate allegations of favoritism, racism, and pre-selection. Groves, p. 47; Pls. Ex. 5. Ethnic preferences and the race of the supervisor played a role in selection. Pls. Ex. 4 at 37-38. 12/6/96 Coffee Memorandum.

In 1996, amid employee concerns regarding the fairness of the DFAS-CO promotion process, Director Charles Coffee and Principal Deputy Director Ida Faye Groves directed a team of DFAS employees and two outside consultants to investigate allegations of favoritism, racism, and pre-selection. The Process Action Team ("PAT team") was asked to examine the following issues:

1. Limited upward mobility opportunities for employees.
2. Limited internal mobility.
3. Consistency in rating, ranking, and referral of applicants.
4. Are only non-minorities advancing to GS-11 and above?
5. Is there disparity in assessing candidates' qualifications?
6. Is there pre-selection for jobs?
7. Are personal relationships impacting selection and promotions?
8. Does nepotism exist - family members (spouses/children) in the same organizations or in supervisory chains?
9. Are management selection patterns discriminatory?
10. Is the distribution of awards, performance appraisals, and disciplinary actions equitable?

11. Do employees fear reprisal from DFAS-HQ and Columbus Center EEO personnel?
12. Does the EEO staff only comply with management's decision?

Pls. Ex. 4 at 0007-09. The PAT team interviewed 25% of the DFAS-CO workforce and analyzed the merit promotion and EEO statistical data for 1995 and 1996. Employees who were not randomly selected to be interviewed were invited to speak with Togar representatives about any concerns that they had with respect to the promotion processes. There were 427 surveys completed. Some of the survey respondents were randomly selected, but anyone else who wanted to was permitted to complete a survey.

The PAT report made the following conclusions:

1. Minorities continue to be promoted at lower rates than non-minority employees especially at the higher levels;

2. Several groups, especially Black males, continue to be underrepresented at the higher grade levels at the Columbus Center;

3. Evaluation of application content was subjective;

4. There is a strong perception that discrimination, whether race based or not, exists at the Columbus Center. In the case of employee X, management may

have committed a prohibited personnel practice;

5. White females received 72 percent of the exceptional rating in 1995. This may have impacted their selection during the Merit Promotion process. This research has shown that supervisors rate employees of their race or national origin group higher than they rate employees from other groups.

6. The data shows that white male selecting officials show strong ethnic preferences in awarding promotions.

The DFAS EEO report provides data on several employment practices that meet the four-fifths rule as noted by the Sixth Circuit. Pls. Ex. 1. Plaintiffs argue that the PAT report findings are admissions by DFAS-CO. Plaintiffs also argue that EEO officer findings are also admissions. But defendant maintains that the PAT report was merely a perception report. Tr. Vol. I at 177:16-25, 178:1-5. The data was not designed to measure disparate impact. *See* Tr. Vol. I at 176:1-9. The PAT team did not randomly select applicant flow data. The survey was not random. There was no statistician on the PAT team. Tr. Vol. IV at 132:17-18; 190: 7-8. Standard statistical procedures were not used. Of the 427 survey respondents, some were randomly selected, but a significant number volunteered to complete the survey. Tr. Vol. I at 189:4-8. The PAT report states that 188 employees who were not randomly selected were interviewed. Pls. Ex. 4 at 57. During FY 95 and FY 96, 77% of the awards went to non-minorities, and only 23% went to

minorities. Pls. Ex. 4 at 1-42. With respect to performance ratings, whites received 72% of the exceptional ratings, although they comprised only 46% of DFAS-CO. Pls. Ex. 4 at 43. Black males received only 4.5% of the highly and exceptional ratings, although they made up 6.47% of DEFAS-CO.

Although 21% of DFAS-CO's employees were African American, they received approximately 49% of the disciplinary actions taken during FY 95 and FY 96. *Id.* at 39. They also received more suspensions. *Id.* During FY 95 there were a total of 21 reprimands, 60 suspensions of up to 14 days, and 15 suspensions of 15 days/removals. *Id.* at 106. During FY 96 there were a total of 14 reprimands, 33 suspensions of up to 14 days, and 17 suspensions of 15 days/removals. *Id.* at 106.[9]

The PAT report also contained some data about the distribution of jobs at DFAS-CO. It states that there were 3076 positions. It listed the total number of positions at each GS level:

GS-3	66	GS-7	671	GS-11	344
GS-4	248	GS-8	54	GS-12	278
GS-5	493	GS-9	125	GS-13	77
GS-6	661	GS-10	2	GS-14	32
				GS-15	12

Id. at 15. In FY 96, 134 vacancy announcements were issued. In FY 95, there were 57. *Id.* In FY 96, 51 of the vacancies were limited to employees within the directorate were the vacancy was. In FY 95, just two of

---

[9] Some employees received multiple disciplinary actions.

the vacancy announcements were so limited.[10] *Id.* at 16. During FY 95 and FY 96, 475 positions were filled. The referred candidate pool for those jobs was 5,264. *Id.* at 23.

The PAT report stated that "minorities continue to be promoted at a lower rates than non-minority employees especially at higher levels." *Id.* at 33. It include an analysis of the number of white males, white females, African American males and African American females who are employed in and promoted to grades 5-8, 9-12 and 13-15. *Id.* at 25-33. However, the report includes only percentages of each group in or promoted to a particular grade range. It does not include the number of qualified African Americans applying for and the number promoted to positions within a grade range. It does give the number of each group as a percentage of the total number of DFAS-CO employees and as a percentage of those employed in each grade range. It gives the percentages of each group included in the referred candidate pool for vacancies in each grade range, but it contains no information about the number of African American and non-minority qualified candidates who applied for position vacancies in the grade range.

---

[10] Defendant offered testimony that once the number of employee positions at DFAS-CO began to contract job vacancy announcements were often limited to the directorate where the vacancy occurred because funds were not available for the position if it was filled by someone from another directorate. Tr. Vol. I at 219:13-20.

V. Conclusions of Law

Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2. Section 2000e-16 of title 42 of the United States Code prohibits certain federal employers from engaging in the same discriminatory conduct.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq*., prohibits both overt discrimination and "practices that are fair in form but discriminatory in operation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); *Alexander v. Local 496, Laborers' Intern. Union of N. Am.*, 177 F.3d 394, 405 (6th Cir. 1999). Title VII precludes "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977); *see also Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 986-7 (1988).

"Disparate impact occurs when a neutral employment practice has an adverse impact on a protected class." *Ramos v. Baxter Healthcare Corp. of Puerto Rico, Inc.*, 256 F.Supp.2d 127, 145 (D.P.R. 2003)

(citing *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993)). Proof of intentional discrimination is not required. *See Mullin v. Raytheon Co.*, 164 F.3d 696, 699-700 (1st Cir. 1999). Rather, a disparate impact claim rests on discriminatory results, i.e., "on proof that the employer utilizes employment practices that are facially neutral in their treatment of different groups but . . . in fact fall more harshly on one group than another and cannot be justified by business necessity." *Id.* at 700 (citations and internal quotation marks omitted).

Typically, a Title VII disparate impact claim has three elements: identification, disparate impact, and causation. *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1190 (9th Cir. 2002). Here plaintiffs ask the Court to consider defendant's promotion process as a whole, rather than a specific hiring or promotion practice. If the Court concludes "that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice." 42 U.S.C. § 2000e-2(k)(1)(B)(I). *Phillips*, 400 F.3d at 398 n.8. To satisfy the merged disparate impact/causation element, plaintiffs must prove by a preponderance of the evidence that African American employees were promoted at a lower rate than white employees. *Id.* Plaintiffs' burden in a Title VII disparate impact case is to identify the facially neutral employment practices challenged and establish that the facially neutral employment practice caused a disparate impact on the basis of race. *Phillips v. Cohen*, 400 F.3d 388, 397-98 (6th Cir. 2005).

For disparate impact claims involving promotional policies, "the relevant statistical inquiry involves

comparing the number of protected group members benefitting from promotions with the number seeking them; this figure is then contrasted with the corresponding ratio for the non-protected group." *Phillips*, 400 F.3d at 399. In determining whether disparate impact has occurred, "expert statistical evidence . . . is not to be considered in a vacuum. . . ; it must be considered 'in light of all the evidence in the record.'" *Id.* at 401 (quoting *Bazemore v. Friday*. 478 U.S. 385, 401 (1986)).

Plaintiffs can satisfy their burden "by demonstrating disparities through statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Bacon*, 205 F.R.D. at 473 (citing *Watson*, 487 U.S. at 986-87; *E.E.O.C. v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1274-75 (11th Cir. 2000)).

Typically, a plaintiff must establish that each challenged employment practice causes a disparate impact, but when "the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice." 42 U.S.C. §2000e-2(k)(1)(B)(I). "In offering statistical evidence, the plaintiff must eliminate the most common nondiscriminatory reasons for the disparity." *Bacon*, 205 F.R.D. at 473 (citing *Mozee v. American Commercial Marine Service Co.*, 940 F.2d 1036, 1045 (7th Cir. 1991)). Plaintiffs are not required to take into account all measurable variables, but they must include the major factors potentially responsible for

any disparity. *Id.* "Normally, failure to include variables will affect the analysis' probativeness, not its admissibility." *Bazemore v. Friday*, 478 U.S. 385, 400 (1986).

Once plaintiff establishes a *prima facie* case, the burden shifts to the employer to produce evidence that the challenged practice is a business necessity. *Alexander*, 177 F.3d at 406 (citing *Wards Cove*, 490 U.S. at 659). Defendant may challenge any of the elements of the *prima facie* case or "show . . . that the challenged practice is job-related and consistent with business necessity." *E.E.O.C. v. Steamship*, 48 F.3d 594, 602 (1st Cir. 1995).

> If the defendant fails in its efforts to counter the plaintiff's prima facie case, then the factfinder is entitled--though not necessarily compelled--to enter judgment for the plaintiff. On the other hand, even if the defendant stalemates the prima facie case by elucidating a legitimate, nondiscriminatory rationale for utilizing the challenged practice, the plaintiff may still prevail if [he] is able to establish that the professed rationale is pretextual. The plaintiff might demonstrate, for example, that some other practice, without a similarly undesirable side effect, was available and would have served the defendant's legitimate interest equally well.

E.E.O.C. v. Steamship, 48 F.3d at 602 (citations and internal quotation marks omitted).

Defendant maintains that plaintiffs have not proven that the promotional process at DFAS-CO is incapable of separation for analysis. Plaintiffs have

failed to respond to this argument either in their April 7, 2006 brief (doc. 20) or in their April 28, 2006 reply to defendant's merits brief (doc. 123).

The statute states plaintiffs' burden of proving disparate impact:

> (k) Burden of proof in disparate impact cases
> (1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if--
> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; . . . .
> (B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

42 U.S.C. § 2000e-2 (k). While I believe that defendant is correct that most of the practices identified by

plaintiffs could be separately analyzed,[11] plaintiffs maintain that the identified employment practices, in the aggregate, gave supervisors a great deal of discretion, which was exercised to the disadvantage of African Americans. Although plaintiffs' briefs discuss a number of selection practices, they do not expressly state which practices they rely on to prove disparate impact. Plaintiffs' briefs discuss the following employment practices: detailing; changing the series number of a position; withdrawing a certificate of referral and later issuing a new JOA; requesting additional names; limiting applications to a particular directorate; performance ratings; performance awards; discipline; favoritism, nepotism and preselection. Each of these practices could be analyzed separately for whether they have a disparate impact on African Americans.

All the promotion selection practices identified by plaintiffs tend to give supervisors more leeway to consider subjective selection criteria. Subjective employment criteria may be challenged under the disparate impact approach. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988). Plaintiffs here do not challenge any of the objective selection criteria,

---

[11] For instance, the disparate impact of detailing could be determined by identifying each detailed employee and determining whether the detailed employees were selected for the positions, and determining the races of each person detailed, and determining the race of each person selected for the positions. A similar analysis could be performed for every position allegedly filled by nepotism or favoritism. The PAT report identified employees who allegedly received promotion through nepotism and favoritism. Their races could be determined.

such as time in grade or positive education requirements.

Each supervisor had a range of selection practices from which to choose. There is no evidence quantifying how often a particular selection practice was used. For example, there is no evidence about the number of positions that were filled temporarily by detailing or the races of all the employees detailed to a position. There is evidence that not all person detailed into a position were eventually promoted into it. Although there is evidence that African Americans received proportionately more discipline than Caucasians in 1995-1996, there is no evidence about the number of disciplined African American employees who applied for promotion or the number who were promoted. Further, based on the number of disciplines identified in the PAT report, only around 3% of employees were disciplined each year during FY 95 and FY 96. There is no evidence of the number of job vacancy announcements that were withdrawn after the human resources department had forwarded the names of the top 15 applicants and ties to the selecting official. Nor is there any evidence about how many withdrawn job vacancy announcements were followed up by a new announcement, a new list, and the selection of an applicant not on the first list for the position.

The Court finds that plaintiffs have sufficiently identified the practices under attack and demonstrated by a preponderance of the evidence that the promotional process at DFAS-CO is incapable of separation for analysis. The competitive promotion process at DFAS-CO was complex and consisted of over 18 separate steps, which permitted the selecting official to exercise a great deal of discretion when

selecting a candidate. The supervisor could determine the timing of an opening, limit the area of consideration, detail an employee into a position, and withdraw a vacancy when the favored promotion candidate was not on the certificate and later seek a new certificate.

Plaintiff Kevin Gray testified that practices such as returning the certificate (Tr. Vol I at 34:6-35-21); selecting a grade not announced in the vacancy announcement (Tr. Vol. I at 35:21 -36:23); limiting the area of consideration for a given vacancy (Tr. Vol. I at 42:16 - 43:13); and preselecting and detailing candidates (Tr. Vol. I at 43:14 - 46:19) negatively impacted African Americans. Plaintiff Willie Phillips testified that the discipline process was administered unfairly on the basis of race. Tr. Vol. IV at 33. Additionally, plaintiffs rely on the conclusions of the PAT report, which indicated that African Americans received approximately 49 percent of all disciplinary actions in 1995 and 1996 although they comprised only twenty-one percent of the DFAS-CO population. Mr. Phillips testified that whether or not an individual received any awards had a significant impact on obtaining a promotion. Tr. Vol. IV at 22. He further testified that he believed that awards were disproportionately granted to people who he did not believe should have received them. Tr. Vol. IV at 25. Performance evaluations were also an important consideration in determining who was promoted because points were assigned on the basis of one's evaluation. Tr. Vol. IV at 25. Mr. Phillips testified that he observed white employees being giving better performance evaluations than their African American counterparts. Tr. Vol. IV at 27.

Saunders testified that a higher performance appraisal generated more points in terms of the promotion evaluation criteria. Tr. Vol. I at 216:17-25–217:1-7. If an individual received an exceptional rating, he would be more likely to rank higher on the referral list as a result.

Defendant argues that plaintiffs have a fundamental misunderstanding of the promotion system at DFAS-CO. Defendant maintains that plaintiffs believe that they were discriminated against if they were referred but not promoted on two or more occasions. Because each certificate of referral could include 15 or more names, it is likely that employees were referred more than once without being promoted. Defendant also points to Saunders' testimony to show that the selecting official was not privy to the "rank" of the candidates of the certificate of referral. The certificate of referral listed the names of the most qualified applicants in alphabetical order. Consequently, selecting officials sometimes selected lower-ranked employees over higher-ranked employees. Finally, defendant maintains that the certificate of referral does not contain any in-formation regarding the race of an applicant. Tr. Vol. IV at 114:21-115:11. Unless the selecting official knew the applicant personally, the selecting official had not way of knowing the race of a particular individual.

Plaintiffs testified that all or nearly all of the selecting officials whom they knew were white. On cross-examination, plaintiffs acknowledged that they only knew ten to twenty selecting officials out of the hundreds. As a result defendant argues that plaintiffs' experiences are not indicative of DFAS-CO as a whole. Furthermore, defendant maintains that African

Americans occupied 26.23% of the supervisory position although they comprised only 21.89% of the DFAS-CO population. *See* Pls. Ex. 1 at 8.

Statistical Evidence.

The Sixth Circuit stated that "the relevant inquiry is comparing the number of protected group members benefitting from promotions with the number seeking them; this figure is then contrasted with the corresponding ratio for the non-protected group." *Phillips*, 400 F.3d at 399. To perform this analysis, the following data is needed: (1) the number of promotions received by protected group members; (2) the number of protected group members applying for promotions; (3) the number of promotions received by non-protected group members; and, (4) the number of non-protected group members applying for promotions. As previously discussed, this data is no longer available, and therefore the parties were forced to attempt to approximate what that data would have revealed if were still available.

Defendant argues that his expert conducted the analysis prescribed by the Sixth Circuit, and plaintiffs' expert did not. Both experts were able to determine the number of promotions received by protected group members and the number of promotions received by non-protected group members by examining "end of year snapshots." If an employee was at a higher grade in year 2 than he was in year 1, both experts assumed that the employee was promoted.[12] *See* Def. Ex. H at

---

[12] It is not clear, however, whether the person was the recipient of a competitive promotion or whether it was the result of an

¶ 14. However, each expert took a very different approach to determine whether promotion policies had a disparate impact on African Americans. Dr. Claudy created "constructed pools" of applicants based on grade, job series, and where possible, time-in-grade. The constructed pools were an attempt to approximate the number of protected and non-protected group members who were likely to apply for promotions. Dr. Paetzold, on the other hand, compared the total number of African American employees to the number of African Americans receiving promotions. She performed the same calculation for white employees. For both categories, she divided the number of employees promoted by the total number of employees, then compared these "two promotion rates." The Sixth Circuit's remand requires a comparison of the ratio of the number of protected employees applying for promotion to the number promoted with the number of non-protected employees applying for promotion to the number promoted.

That is $\frac{\text{the protected employee promoted}}{\text{the protected employees applying}}$

is compared with

$\frac{\text{the non-protected employee promoted}}{\text{the non-protected employees applying}}$

---

automatic grade increase. Several plaintiffs testified that they either held or sought positions that were, for example, a 7 target 11 position. In this type of a position, the person would automatically advance from a 7 to a 9 to an 11 as long as the employee satisfactorily performed their job duties.

The problem faced by Dr. Paetzold and Dr. Claudy is that none of these numbers is available. They attempted to approximate the numbers. However, approximating the unavailable data is a very difficult, if not impossible, task. The critical information unavailable is staggering. Although a good fix on the total number of promotions each year can be obtained from the end of year snapshots by identifying the employees who were at a higher grade than the previous year, this case involves only competitive promotions. An unknown number of employees who were at a grade level higher than the previous year received noncompetitive promotions. They were in a job with a grade progression, *e.g.*, GS 7/9/11, and they had completed their time in grade at a lower level with satisfactory job performance and evaluations and had been "automatically" promoted to the next grade level in the sequence. Neither plaintiffs nor defendant offered any evidence on the number of positions with non-competitive grade progressions or about the number of such noncompetitive promotions during 1992-1996.

For the competitive promotions, the minimum qualifications for applying for the promotion are unknown because the Job Opportunity Announcement for the positions are unavailable. Further, the number of employees applying for each competitive vacancy is unknown as is the race of each applicant.

Dr. Paetzold's approach makes no attempt to identify who applied for a promotion. And it assumes–without a supporting explanation–that both minorities and non-minorities would apply for a given position at the same percentages as they are represented in the workforce. In contrast, Dr. Claudy

does attempt to identify the members of the protected class and the members of the non-protected class who applied for promotion. The flaw in his approach is that he assumes–without supporting explanation–that all persons eligible for promotion–however minimally qualified–applied for promotion. He also considered an employee eligible for promotion–after a year in grade–only if the employee was in the same series as the job vacancy. But depending on the JOA qualifications for the position, employees in other series may have been qualified.

Dr. Paetzold argued that Dr. Claudy did not directly compare African Americans promoted and Whites promoted. Tr. Vol. IV at 152-52. Ultimately, neither approach is particularly helpful in determining whether African Americans suffered a disparate impact with respect to promotional opportunities at DFAS-CO.

Dr. Claudy performed the Multiple Events Exact Probability Test and analyzed the pools separately and then aggregated the results. Dr. Claudy testified:

> [The Multiple Events Exact Probability Test] combines the best aspects of both [methods]: the power of including many selection events in a single statistical test so that even small amounts of disparity are detectable, and the precision of treating pools of similarly situated employees separately, so that differences in the selection rates for protected group members and other employees are not confounded with differences in selection rates across occupations and grade levels.

Def's Exh. H at 30-31. Although the Sixth Circuit noted that courts have exhibited skepticism toward constructed pools, defendant maintains that Dr. Claudy's use of grade and series to construct applicant pools does not warrant suspicion and is distinguishable from *Mozee v. Am. Commerce Marine Ser. Co.*, 940 F. 2d 1036, 1045 (7th Cir. 1991). *See Phillips*, 400 F.3d at 400. In *Mozee*, the Seventh Circuit criticized the post-hoc construction of qualifications that were neither obvious nor far from uniformly applied. According to defendant, the use of grade, job series, and to the extent possible, time-in-grade are obvious, and uniformly applied. They are critical components of the federal personnel system. Dr. Claudy used the grade and job series to determine who might have applied rather than, as the expert criticized in *Mozee* did, to justify who was selected. I agree that grade, job series, and time-in-grade are reasonable criteria for attempting to reconstruct who applied for job vacancies. Indeed, given the unavailability of the applicant flow data, they are the best available indicators of who may have applied for a job vacancy. Dr. Claudy's Fisher Exact Test results are set out in Def.'s Exs. H and I. He did compare African Americans with non-African Americans, Tr. Vol. V at 29:17-30, 22, and found no statistical support for disparate impact Tr. Vol. V at 42:4-7. Defendant notes that Paetzold recommends constructed pool analysis in her book.

Dr. Claudy's constructed pools, however, are both under- and over-inclusive. This approach does not account for applicants who applied for positions in a different series. It also does not differentiate between competitive promotions and automatic promotions, as in the case of a 7 target 11 position. It also fails to take

into account that some promotional opportunities had a limited area of consideration. Some potential applicants were foreclosed from pursuing a particular promotion, although they may have been within the grade and series that Dr. Claudy believed to be the likely pool of candidates, because it was only available to employees of a particular directorate.

Although defendant maintains that grade and series were a significant indicator of who likely comprised the applicant pool, several plaintiffs testified that they applied for positions outside of their series. Some plaintiffs were ultimately successful in obtaining positions in a different series. Yulander Edwards testified that she considered series significant. She had been assigned to the 503 series prior to her arrival in Columbus, and she believed that being in this series prevented her from advancing. Tr. Vol. II at 18. Before coming to DFAS, Ms. Edwards had experience in the 525 and 540 series. She was eventually promoted to GS 9/501 position in 2001.

Lisa Prater testified that she began working at DFAS as a GS 4/503. II-51. She was promoted to a position in the 510 series. Tr. Vol. II at51. Susan McNeal testified that she was told prior to moving to Columbus that she was eligible for positions in 540, 525, and 503 series. Mary Phillips testified that as a GS 5/525, she applied for positions as a 525 accounting technician and 501 financial specialist. Tr. Vol. III at 9. Although she was in the 503 series, Denise Goudy testified that she applied for a position in the 501 series. Tr. Vol. III at 111. Willie Phillips testified that he began at DFAS in the 525 series and now works in the 501 series. Tr. Vol. IV at 4-5. Mr. Phillips also worked in the 540 series, Tr. Vol. IV at 12, and he

testified that he applied for at least one position in the 503 series. Tr. Vol. IV at 84. Several plaintiffs also testified that on occasion they may have applied for a position a grade lower than their current level given that some positions had automatic grade increases that would ultimately lead to grade levels higher than their current position.

Given these limitations, the Court finds that although defendant's expert's analysis is some evidence on the issue of disparate impact, it is not determinative of whether DFAS-CO's promotional practices had a disparate impact on African Americans from 1992 to 1996.

Plaintiffs argue that Dr. Paetzold presented statistical proof, within a reasonable scientific certainty, that African American promotion rates were significantly lower than white promotion rates. Dr. Paetzold looked at the aggregate promotion rates. She calculated the "promotion rates" by dividing the number of African American employees promoted by the total number of African American employees at DFAS-CO. She made the same calculation for white employees. Then she compared the promotion rates for African American and white employees by using a binomial test.

Next, Dr. Paetzold evaluated whether any differences in promotion rates were statistically significant. Tr. Vol. VI at 14. Dr. Paetzold considered a difference to be statistically significant if it was two or more standard deviations. She found that the aggregate promotion rate for all African American employees at DFAS-CO from 1992 to 1996 was 42.23%, while the rate was 45.87% for Caucasian employees.

Pls. Ex. 24, App. This resulted in a p-value of .013. Tr. Vol. VI at 16. As a result, Dr. Paetzold concluded that African American employees were promoted at a statistically significant lower rate compared to white employees because the difference in the promotional rates for African Americans and whites were greater than two standard deviations.

Defendant argues that Dr. Paetzold had to separately analyze employees by gender to find a statistical disparity. Paetzold dep. p. 43:4-9. According to defendant, the aggregate analysis is of no value because it fails to approximate the number of candidates who actually sought promotion.

Although Dr. Paetzold conducted one large analysis that spanned the years from 1992 to 1996, she also examined the data year by year and found a statistically significant difference in promotion rates for African American men and Caucasian men who were employees at DFAS-CO in 1993.[13] The promotion

---

[13] When asked to explain why she examined both race and sex, Dr. Paetzold stated:

> Sometimes it is helpful to look at sex in addition, since sex was presented in the data file. The difference in the promotion rates for the two racial groups could be due to either men or women within the two racial groups, and so I looked at both African American and white women and African American and white men. I did not find any difference for the men during that 1992 to 1996 period, but I was able to identify that the difference in promotion rates between African Americans and whites appear to be as a result of a difference in promotion rates, in particular, between African American women and white women.

VI 19. However, Dr. Paetzold's expert report indicates that she

rate for African American men was 30.77%, while the rate for Caucasian men was 37.79%. Oct. 22, 2002 Report of Dr. Paetzold, App. 5. According to Dr. Paetzold, this resulted in a p-value of .023. The next greatest difference that Dr. Paetzold found was in the promotion rates of African American women and Caucasian women in 1994. The promotion rate for African American women was 26.5%, while the rate for Caucasian women was 29.6%. *Id.* This resulted in a p-value of .06, which Dr. Paetzold termed to be of "marginal significance" and 1.5 standard deviations beyond what would be expected in the absence of discrimination. *Id.*

Defendant argues that Dr. Paetzold's analysis is contrary to the law of disparate impact and common sense because it mistakenly relies on the assumption that all employees sought each promotion. Dr. Paetzold did not calculate the ratio of African American employees promoted to African American employees applying for positions and comparing it with the ratio of non-minorities promoted to the number of non-minorities applying for positions as required by the case law. *Phillips*, 400 F.3d at 399. Defendant maintains that this assumption is particularly problematic in the context of the federal personnel system, which has time-in-grade and series requirements. Defendant argues that promotional policies cannot have a disparate impact on employees who never sought a promotion; therefore, the appropriate analysis compares the number of

---

found statistically significant differences for African American men, rather for African American women.

employees receiving promotions to the number of employees seeking promotions.

Dr. Claudy testified that the single pool approach employed by Dr. Paetzold is inherently flawed because it treats all employees as being entirely fungible. Defendant argues that one disproportionate applicant pool can skew the entire result, and the single pool approach results in a correct calculation only where protected group members make up exactly the same proportion of each applicant pool or exactly the same proportion is selected from every pool. Furthermore, Dr. Paetzold's analysis fails to eliminate the most significant, obvious, and non-discriminatory reasons for the disparity, job series and grade level.

Defendant criticizes Dr. Paetzold's methodology. Defendant argues that Dr. Paetzold failed to explain her methodology and failed to report the results of each analysis she conducted. In fact, Dr. Paetzold could not even recall which analyses she conducted. Tr. Vol. VI at 32-33. Dr. Paetzold only recalled those analyses that were included in her report–those yielding results beneficial to plaintiffs' case. Dr. Paetzold only reported those results that were statistically significant, although she did not report all statistically significant results. As a result of failing to fully explain her methodology and report the complete results of her analysis, the Court's ability to evaluate her conclusions is severely hampered.

A disparate impact analysis compares "the number of protected group members benefitting from promotions with the number seeking them; this figure is contrasted with the corresponding ratio for the non-protected group." *Phillips*, 400 F.3d at 399. Dr.

Paetzold treated all employees as equally eligible for a promotion, regardless of their job series or grade level, so she assumed that all African Americans and all whites applied for each promotion. That assumption has no factual basis in the record. Further, it ignores the basic premise of a *prima facie* case, that if qualified African American applicants receive substantially fewer promotions than the ratio of qualified African American applicants to the total qualified applicant pool, there is an inference that race was a factor in the selection. By failing to account for job series and grade level, Dr. Paetzold failed to eliminate the most common nondiscriminatory reasons for the disparity, such as whether the applicant was qualified. *See Bacon v. Honda of Am. Mfg., Inc.*, 205 F.R.D. 466, 473 (S.D. Ohio 2001) ("In offering statistical evidence, the plaintiff must eliminate the most common nondiscriminatory reasons for the disparity."). As defendant argues, even when racial discrimination is not a factor, a Caucasian employee at grade 12 is more likely to receive a promotion to grade 13 than an African American employee at grade 4. Dr. Paetzold's analysis treats the grade 4 employee as if he is equally likely as the grade 12 employee to receive the promotion. Further, she treats a grade 12 employee as equally likely as a grade 4 employee to receive a job opening at grade 5, even though it would be a demotion.

Non-Statistical Evidence. In addition to relying on Dr. Paetzold's statistical analysis, plaintiffs rely on the conclusions of the PAT report, statements made by Ida Faye Groves in a presentation to DFAS headquarters, the EEO report, and the testimony of plaintiffs to show that defendant's promotion practices had a disparate impact on African Americans. Although the Sixth

Circuit concluded that the PAT report and anecdotal evidence provided some evidence of disparate impact, and, as a result, summary judgment was not appropriate, defendant maintains that plaintiffs cannot demonstrate disparate impact by a preponderance of the evidence based on either anecdotal evidence or the PAT report.

Plaintiffs maintain that the PAT report concluded that defendant's promotional practices created a disparate impact on African American employees. Defendant argues that the PAT Report is inherently unreliable because it was a perception report that was not designed to collect statistically meaningful data. Tr. Vol. I at 177:16-25–178:1-5. The PAT team did not conduct a statistical analysis of the collected data, and the data was not collected from a random pool of employees. Instead, the PAT Report was based on the perceptions of a non-random, potentially biased, pool of employees.

The PAT Report is not sufficient to support plaintiffs' allegations of disparate impact. The PAT analyzed merit promotion and EEO statistical data for fiscal years 1995 and 1996, as well as interviewed employees concerning their perceptions of employment practices at DFAS-CO. One of the issues examined by the PAT was: "Are only non-minorities advancing to the GS-11 level and above?" They based their analysis on the Bureau of Labor's 1990 Census of the civilian labor force of the Columbus Metropolitan Area, which reported that African Americans make up 10.7% of the

civilian labor force in the Columbus Metropolitan Area.[14]

The PAT found that, in comparison to the civilian labor force of the Columbus Metropolitan Area, African American employees at DFAS-CO were over--represented in grades 5-8 (22.1% of the DFAS-CO workforce)), grades 9-12 (20.0%), and grades 13-15 (13.2%). *See* PAT Report, at 28-31, 114. The PAT found that, for fiscal years 1995 and 1996, African American employees at DFAS-CO were selected for promotion 21.6% of the time in grades 5-8, 17.8% of the time in grades 9-12, and 6.6% of the time in grades 13-15. *See* PAT Report, at 28-31.

The difficulty with the PAT's promotions data is that it exists in a vacuum. The PAT did not perform a statistical comparison of the promotions data with an expected rate of promotion for African Americans at DFAS-CO. The expected rate that the PAT references is the percentage of African Americans in the civilian labor force in the Columbus Metropolitan Area. This is too broad, for it rests on the assumption that the percentage of African Americans qualified for grades 13 through 15 is the same as the overall percentage of African Americans in the civilian labor force in Columbus–an assumption which plaintiffs have offered no evidence to substantiate. *See Wards Cove Packing Company, Inc. v. Atonio, et al.*, 490 U.S. 642, 650-51 (1989) ("It is such a comparison–between the racial

---

[14] The PAT report analyzed African American males and African American females separately, a distinction not relevant to the case at hand. Therefore, this Opinion and Order uses the PAT's combined results for all African Americans.

composition of the qualified persons in the labor market and the persons holding at-issue jobs–that generally forms the proper basis for the initial inquiry in a disparte-impact case."); *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 483-84 (9th Cir. 1983) ("[Plaintiff] has failed to establish that there were any black female employees qualified for the positions in Labor Grades 15-20."). The actual number of African American employees at DFAS-CO qualified for a given promotion could well have been greater than, or less than, the number of African Americans in the Columbus civilian labor force. Like Dr. Paetzold, the PAT did not compare the actual promotion rates of African Americans with an expected rate that accounted for minimal qualifications. Further, the PAT did not conduct a statistical analysis to determine how great the disparity was in terms of standard deviations. Simply put, the PAT Report does not contain reliable evidence that African Americans at DFAS-CO suffered a disparate impact in promotions.

With respect to the PAT report, the Court concludes that this type of survey of employee perceptions and experiences, standing alone, cannot show disparate impact. This survey was neither random nor of a large enough scale to demonstrate that its findings were reliable and valid. Many of the plaintiffs acknowledge their participation in the survey, either through direct or indirect communications with representatives of Togar. The EEO report indicates that African Americans were disproportionately represented in the survey performed by the PAT team. Pls. Ex. 1, at 6. Despite the Court's belief that plaintiffs' participation was based on their sincere belief that DFAS-CO's promotional policies resulted in qualified African

Americans being denied promotion, this manner of collecting data is susceptible to skewed results.

Plaintiffs also argue that talking points from Ida Faye Groves's presentation at DFAS headquarters in Arlington, Virginia on February 24, 1997 is an admission that minorities continued to be promoted at lower rates than non-minorities, especially at the higher grade levels. Plaintiffs further argue that the July 24, 1997 EEO report presents compelling evidence of ethnic preferences among white supervisors by promoting white employees. Plaintiffs cannot meet their burden of proof by relying on the non-statistical evidence of record alone. Plaintiffs mischaracterize Ms. Groves's presentation to DFAS headquarters. There is nothing in the records which suggest that Ms. Groves was doing anything other than communicating the conclusions of the PAT team.

Finally, plaintiffs argue that their trial testimony demonstrates that promotion policies had a disparate impact on African Americans. This testimony, without the benefit of supporting statistical analysis, does not show that African Americans as a group were negatively impacted. In *Wards Cove Packing Co., Inc. v. Atonio,* 490 U.S. 642 (1989), the United States Supreme Court held that "the proper basis for the initial inquiry in a disparate-impact case" is a comparison "between the racial composition of the *qualified* persons in the labor market and the persons holding at-issue jobs." 490 U.S. at 650-51 (emphasis added). Plaintiff must demonstrate a statistical disparity based on "'the racial composition of [the at-issue jobs] and the racial composition of the qualified . . . population in the relevant labor market.'" *Id.* at 650 (quoting *Hazelwood School Dist. v. United*

States, 433 U.S. 299, 308 (1977)). Unfortunately, plaintiffs' testimony does not provide this Court with the evidence necessary to support a finding of disparate impact.

Plaintiffs were all hard working DFAS-CO employees who reasonably might have expected more rapid promotion during 1992-1996 than they got. They also reasonably believed that a few promotions singled out in their testimony suggested favoritism or preselection. They also had reason to be concerned about whether detailing, changing the series of a position, limiting applications to one directorate, performance awards, and performance ratings might have adversely affected their opportunities for promotion.[15] However, there is no evidence from which the Court could conclude by a preponderance that any of the plaintiffs were denied promotion to a particular position because of their race. As to each of the job vacancy announcements about which the individual plaintiffs testified, there is no evidence of the position description and job qualifications, the race of the top fifteen applicants and ties, or their qualifications. This is a disparate impact case, so the issue is whether plaintiffs have presented statistical evidence which, when weighed with their testimony and the relevant facts in the PAT report, prove by a preponderance that the employment process they have identified had a disparate impact on African Americans.

On balance, I find Dr. Claudy's expert opinion that there is not statistical evidence that African

---

[15] There is no evidence that they personally were held back by unwarranted discipline.

Americans who applied for promotion were selected less often than chance at least as credible and trustworthy as Dr. Paetzold's opinion to the contrary. Both experts' opinions are entitled to little weight because both were unable to compare the ratios of the number of African American applicants promoted to the number of African American applicants with the ratio of the number of non-minority applicants. Dr. Claudy–unlike Dr. Paetzold–at least made an attempt to re-construct the applicant pools, but he made a number of assumptions about who would likely have applied that are not supported by the record. Moreover, he assumed every promotion was a competitive promotion, while the record demonstrates that a number of promotions were non-competitive. Dr. Paetzold's opinion is unreliable because she assumed every employee applied for every promotion. She also assumed every promotion was a competitive one. Further, she could not tell the Court all of the analysis of the data she performed, and she reported only some of the statistically significant results she found. Focusing solely on the statistical evidence, I find the evidence to be evenly balanced, so that plaintiffs have failed to meet their burden of proving that the ratio of African Americans selected for promotions to those applying statistically significantly smaller than the ratio for whites. Weighing all the evidence admitted into the record, I find that it is no better than evenly balanced on the issue of whether the employment practices identified by plaintiffs had a disparate impact on qualified African Americans who applied for promotion. Consequently, I find that plaintiffs have failed to prove by a preponderance of the evidence that African Americans were disparately impacted by the employment practices they identified.

Accordingly, the Clerk of Court is DIRECTED to enter JUDGMENT for defendant.

s/ Mark R. Abel
United States Magistrate Judge